United States Court of Appeals

for the Second Circuit

APPENDIX

76-1114

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1114

UNITED STATES OF AMERICA,

Appellee,

—v.—

DONALD PAYDEN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S APPENDIX

JAY GOLDBERG
Attorney for Appellant
299 Broadway
New York, N.Y. 10007
(212) 374-1040

ROBERT B. FISKE, JR.
Attorney for Appellee
United States Attorney for the
Southern District of New York

UNITED STATES COURT OF APPEALS
FILED
APR 13 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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A 1

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

75 CRIM. 421

D. C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES vs. DONALD RAYDEN a/k/a Country-1,2,3 BILLY VERNON-1,2,3,6 DAVID BELL-1,6,7 LESTER BELL-1,4,5,6 JANE DOE-a/k/a Jackie Smith-1,4,5	*For U. S.:* Michael O. Carey AUSA 791-0363 3/11/76 *For Defendant:* (2)Sidney Meyers 51 Chambers St,NYC 10007 tele: Wo 2-1593

(07) STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk					
J.S. 3 mailed /	Marshal					
Violation	Docket fee					
Title 21						
Sec. 846, 812,841,(a)(1),(b)						
Consp. to viol. Fed. Narcotic Laws,(Ct.1)						
Distr. & possess. w/intent to distr. Cocaine,H.(Cts.2-7)						
(Seven Counts)						

DATE	PROCEEDINGS
7-25-75	Filed Indictment. B/W's ordered as to all defts. Pierce,J.
7-10-75	Filed Notice of Appearance of Wm.C.Chance,Jr.
8-4-75	Filed the following papers received from Mag.Raby: Docket entry sheet Indictment Warrant,SDNY Disposition sheet Appointment of Counsel Appearance Bond
8-11-75	Pleading adjourned to 8-18-75 as to deft. Billy Vernon. Warrant to be lodged as a detainer. Stewart,J.
8-18-75	Deft. Vernon(atty. present) B/W vacated. Pleads not guilty. Bail fixed at $35,000. Continued. Case assigned to Judge Gagliardi. Owen,J.

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PROCEEDINGS

09-19-75 B. Vernon- filed notice of appearance of atty.

09-08-75 B. Vernon-filed CJA 23 financial affdvt.

9-29-75 Filed Govt.'s notice of readiness for trial.

10-09-75 David Bell- Bail revoked. Gagliardi,J.

10-28-75 Filed documents forwarded by Magistrate Hartenstine:docket sheet, warrant for arrest,notice of appearance of atty. & appearance bond,($5,000.).

10-24-75 Deft. Lester Bell-bench warrant ordered. Gagliardi,J.

11-7-75 Filed affdvt. of D. Payden re: support of motion for suppression.

10-31-75 David Bell-bench warrant issued.

11-19-75 Filed deft. B. Vernon's requests to charge.

11-19-75 Filed deft. D. Payden's notic eof motion re: b/p,etc.

11-19-75 Filed deft. D. Payden's request to charge.

11-19-75 Filed List of 3500 Exhibits turned over to defts. during trial, (marked Govt.'s exhibit 4id)

11-13-75 Before Judge Gagliardi -jury trial begun as to defts. Donald Payden and Billy Vernon on counts 1,2,3,6 only. All other cts. severed.

11-14-75 Trial cont'd.

11-17-75 Trial cont'd. Bench warrant ordered for witness John Law.

11-18-75 Trial cont'd and concluded. Deft. Donald Payden - guilty counts1 & 3 and not guilty count 2. Bail fixed at $20,000. cash or surety to be posted on 11-21-75 at 12:30 PM. Deft. is to call his atty. Jack Goldberg on Wed.,Thurs. & Fri at 10AM.every morining. P.S.I. ordered., for sentence 1-20-75 at 9:30AM. Deft.cont'd. on present bail until 11-21-75 at 12:30PM. when he is to post new bail. Deft. Billy Vernon-guilty counts 1,2,3 & 6. Deft. remanded. P.S.I. ordered., for sentence 1-20-75. Gagliardi,J.

11-21-75 Filed Appearance Bond for deft. Donald ~~Payden- $20,000. surety bond.~~

8-18-75 Lester Bell-bench warrant issued.

~~12-23-92~~ ~~Filed transcript~~ of record of proceedings, dated 12/13, 14, 12/16, 1975.

02-11-76 Jane Doe-c/n Jacqueline Smalls(atty. Leon Port present) deft. pleads not guilty. Deft. cont'd. on $1,000.P.R.B. Gagliardi,J.

2-18-76 Filed Order deft. Billy Vernon re: ~~visit mother in hospital.~~ Gagliardi, Gagliardi,J. dated 10-29-75.

DATE	PROCEEDINGS
3-01-76	Filed Order [redacted] marriage of deft. Billy Vernon ,etc. Gagliardi,J.m/n
03-01-76	Donald P[redacted] (atty. present) Filed Judgment-cts. 1 & 3 6 yrs. impr. e[redacted]t. conc. 6 yrs. S.P. 21:841 & FINED $5,000. on ct. 1. Deft.'s bail increased to $20,000. cash or surety by $10,000. P.R.B. to be signed by deft. and George L. Di Placidi, to be posted by 12 noon on 3-2-76, on cts. 1&3. Gagliardi,J. issued all copies.
03-01-76	D. Payden-filed notice of appeal from judgment of 3-1 -76. mailed notices

A 4

Original Indictment

(Conspiracy to distribute and possess with intent to distribute narcotic drug.)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Docket Number 75 Cr. 421 (LPG)

UNITED STATES OF AMERICA,

—v.—

DONALD PAYDEN, a/k/a Country, BILLY VERNON, DAVID BELL, LESTER BELL and JANE DOE, a/k/a JACKIE SMITH,
Defendants.

The Grand Jury charges:

1. From on or about the 1st day of August, 1974 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, Donald Payden, a/k/a Country, Billy Vernon, David Bell, Lester Bell and Jane Doe, a/k/a Jackie Smith, the defendants, and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule II narcotic drug controlled substances the exact amount

thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York.

1. On or about August 6, 1974, at approximately 9:45 p.m., Billy Vernon, the defendant, met two people in front of 125 West 116th Street, New York, New York.

2. On or about August 6, 1974, at approximately 9:55 p.m., Donald Payden, a/k/a Country and Billy Vernon, the defendants, had a conversation across the street from 356½ West 145th Street, New York, New York.

3. On or about August 6, 1974, at approximately 10:20 p.m., Billy Vernon, the defendant, possessed approximately 27.2 grams of cocaine in front of 356½ West 145th Street, New York, New York.

4. On or about August 27, 1974, at approximately 6:25 p.m., Donald Payden, a/k/a Country and Billy Vernon, the defendants entered 356½ West 145th Street, New York, New York.

5. On or about August 27, 1974, at approximately 7:10 p.m., Donald Payden, a/k/a Country and Billy Vernon, the defendants, had a conversation in front of 356½ West 145th Street, New York, New York.

6. On or about August 27, 1974, at approximately 7:15 p.m., Donald Payden, a/k/a Country and Billy Vernon, the defendants, entered an auto-

mobile in the vicinity of 356½ West 145th Street, New York, New York and drove away.

7. On or about August 27, 1974, at approximately 8:45 p.m., Billy Vernon, the defendant, possessed approximately 53.2 grams of cocaine at Jimmy Daniel's Bar and Grill, 118 West 116th Street, New York, New York.

8. On or about September 12, 1974, at approximately 9:25 p.m., Lester Bell and Jane Doe, a/k/a Jackie Smith, the defendants, drove to 130 West 116th Street, New York, New York.

9. On or about September 12, 1974, at approximately 9:25 p.m., Jane Doe, a/k/a Jackie Smith, the defendant, possessed approximately 27.3 grams of cocaine.

10. On or about September 30, 1974, at approximately 7:42 p.m., in the Footsteps Supper Club, 1917 Seventh Avenue, at 116th Street, New York, New York, Lester Bell, the defendant had a conversation about the sale of cocaine.

11. On or about September 30, 1974, at approximately 8:50 p.m., Jane Doe, a/k/a Jackie Smith, entered the Footsteps Supper Club, 1917 Seventh Avenue, at 116th Street, New York, New York.

12. On or about September 30, 1974, at approximately 8:55 p.m., at 122 West 114th Street, New York, New York, Jane Doe, a/k/a Jackie Smith possessed approximately 22.9 grams of cocaine.

13. On or about October 3, 1974, at approximately 8:45 p.m., Billy Vernon and Lester Bell, the defendants, had a conversation in front of the Soul Expression Restaurant, 117 West 116th Street, New York, New York.

14. On or about October 3, 1974, at approximately 10:20 p.m., Lester Bell, David Bell and Billy Vernon, the defendants, were in Apartment 17, 125 West 116th Street, New York, New York.

15. On or about October 3, 1974, at approximately 10:20 p.m., David Bell, the defendant, possessed approximately 55.5 grams of cocaine.

16. On or about October 9, 1974, at approximately 9:15 p.m., Billy Vernon, the defendant entered the Soul Expression Restaurant, 117 West 116th Street, New York, New York.

17. On or about October 9, 1974, at approximately 10:00 p.m., David Bell, the defendant, possessed approximately 6.1 grams of cocaine in front of the Soul Expression Restaurant, 117 West 116th Street, New York, New York.

(Title 21, United States Code, Section 836.)

COUNT TWO

The Grand Jury further charges:

On or about the 6th day of August, 1974 in the Southern District of New York, Donald Payden, a/k/a Country and Billy Vernon, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 27.2 grams of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT THREE

The Grand Jury further charges:

On or about the 27th day of August, 1974, in the Southern District of New York, Donald Payden, a/k/a

Country and Billy Vernon, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 53.2 grams of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841 (b)(1)(A).)

COUNT FOUR

The Grand Jury further charges:

On or about the 12th day of September, 1974, in the Southern District of New York, Lester Bell and Jane Doe, a k/a Jackie Smith, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 27.3 grams of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841 (b)(1)(A).)

COUNT FIVE

The Grand Jury further charges:

On or about the 30th day of September, 1974, in the Southern District of New York, Lester Bell and Jane Done, a k/a Jackie Smith, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 22.9 grams of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841 (b)(1)(A).)

COUNT SIX

The Grand Jury further charges:

On or about the [illegible]d day of October, 1974 in the Southern District of New York, David Bell, Billy Vernon

and Lester Bell, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 55.5 grams of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841 (b)(1)(A).)

COUNT SEVEN

On or about the 9th day of October, 1974 in the Southern District of New York, David Bell, the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance. to wit, approximately 6.1 grams of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841 (b)(1)(A).)

PAUL J. CURRAN
United States Attorney

.....
Foreman

(1)

D. J. A. 10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA	:	75Cr. 421
-against-	:	
DONALD PAYDEN,	:	NOTICE OF MOTION
Defendant.	:	

S I R S :

PLEASE TAKE NOTICE that upon the indictment herein, upon the annexed affirmation of JACK G. GOLDBERG, ESQ., duly affirmed the 31st day of October, 1975, and upon all the proceedings heretofore had herein, the undersigned will move this Court, before the Honorable Lee P. Gagliardi in Room 2804, at the United States Courthouse, Foley Square, New York, New York, on the 3rd day of November, 1975, at the opening of Court on that day or as soon thereafter as counsel can be heard, for an Order:

I. Pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure, directing the United States Attorney for the Southern District of New York to furnish to the undersigned a bill of particulars of the indictment herein as follows with respect to each specified count of the indictment:

A. With respect to the First Count:

1. State when, where and in what manner defendant, PAYDEN, became a member of the conspiracy and during what period of time he continued to be a member.

2. State the names, addresses (at present

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and at the time of their participation in the conspiracy) and occupations of all co-conspirators known to the Government, whether or not they were known to the Grand Jury at the time of the filing of the Indictment.

3. State as to overt acts 1-7 the names and addresses of any co-conspirators beside the defendant and Dilly Vernon or other persons assisting in, present during or otherwise related to the performance of these overt acts, (including, but not limited to, the persons from whom the controlled substances referred to in overt acts 1-7 are alleged to have been obtained.)

4. Describe the method or means by which overt acts 1-7, inclusive, were performed by all persons performing or assisting in the performance of the acts.

5. State the composition, qualitative and quantitative amounts of the controlled substances referred to in overt acts 3 and 7 and describe the form of the substances and the containers in which they were located.

6. Describe all overt acts not specifically enumerated and set forth in the First Count which are alleged to have been done in furtherance of the conspiracy and specify when, where and by whom they were performed.

7. As to defendant, PAYDEN, describe, in terms sufficient to identify the facts for the purpose of defense, the acts or statements deemed by the Government to be indicative of an instant intent to distribute a controlled substance.

8. State in what manner each overt act furthered the object of the conspiracy.

B. With respect to the Second and Third Counts:

1. State whether defendant PAYDEN is alleged to have distributed the controlled substances as a principal and whether he is alleged to have aided, abetted, counselled, commanded, induced, procured or willfully caused the distribution of the substances.

2. State whether defendant PAYDEN is alleged to have possessed the controlled substances with intent to distribute it, as a principal, and whether he is alleged to have aided, abetted, counselled, commanded, induced, procured or willfully caused possession of the substances with intent to distribute it.

3. State the exact times and places when the alleged offense occurred, the names and addresses of the persons to whom the controlled substances are alleged to have been distributed, the names and addresses of any co-conspirators or other persons assisting in or present during the commission of the alleged offenses and the names and addresses of the persons from whom it is alleged the defendant obtained the controlled substances, if known by the Government.

4. Describe the method or means by which the alleged offenses were committed by each person committing or assisting in the commission of the offenses, including without limitation how each person distributed or possessed the controlled substances.

5. State the strength of the controlled substances and describe the form of the substances and the container in which it was located.

6. As to the defendant, describe, in terms sufficient to identify the facts for the purpose of defense, the acts deemed by the Government to be indicative of an intent to distribute controlled substances.

C. With Respect to all Counts:

1. State the manner, time, place and date of the arrest of the defendant.

2. State the time, place and procedure by which the defendant was identified at the time of his arrest.

3. State the reasons, if any, for it to take fourteen (14) months for the Government to arrest DONALD PAYDEN.

4. Set forth the amounts and denominations of monies allegedly used as payment, if any.

5. State the exact time, place and date of the arrest of all co-defendants.

6. State whether or not any co-defendants have made any self-inculpatory statements or self-exculpatory statements or sta ments that would exculpate the defendant, PAYDEN.

7. State whether or not such statements that would exculpate DONALD PAYDEN were introduced before the Grand Jury.

8. Set forth as accurately as possible the language used by any co-defendant that allegedly incriminates DONALD PAYDEN.

II. Pursuant to Rule 16(a) and (b) of the Federal Rules of Criminal Procedure, directing that said United States Attorney:

A. Produce and permit defendant PAYDEN to inspect and copy or photograph all written and recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the Government, the existence or which is known, or by the exercise of due diligence may become known, to the attorney for the Government and state the substance of any statements and confessions not written or recorded.

B. Produce and permit said defendant to inspect and

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copy or photograph all recorded testimony of said defendant before a Grand Jury.

C. Produce and permit said defendant to inspect and copy or photograph the results of reports and worksheets of physical or mental examinations, and of scientific tests or experiments made in connection with this case, including the psychiatric reports or profiles of all Federal, State and City Police Officers or special agents involved in the investigation of the instant case. Furthermore, permit the defendant to inspect all psychiatric reports and/or profiles of any and all cooperating individuals otherwise known as informers.

D. Produce and permit said defendant to inspect and copy or photograph all books, papers, documents, tangible objects, building or places relating to each of the following matters:

1. The conspiracy alleged in Paragraph 1 of the First Count of the indictment;

2. The plan to distribute and possess with intent to distribute controlled substances alleged in Paragraph 2 of the First Count;

3. Each of overt acts 1 through 7, inclusive, in the First Count and each overt act not specifically enumerated and set forth in the First Count which is alleged to have been done in furtherance of the conspiracy;

4. The distribution and possession with intent to distribute controlled substances alleged in the Second & Third Counts.

E. Produce and permit said defendant to inspect and copy or photograph all written or recorded statements or confessions relating to this case made by anyone, or copies thereof, which are within the possession, custody, or control of the Government and state the substance of any statements not written or recorded.

F. Produce and permit said defendant to inspect and copy or photograph all books, papers, docu-

ments and tangible objects which the Government presented or showed to the Grand Jury or expects to use at trial.

G. State what books, papers, documents, tangible objects, information or leads to information (including without limitation items seized from defendant [illegible]) that were obtained in connection with the investigation of this case, when, where, under what circumstances and in the presence of whom each of said items was obtained and whether each of said items was used or will be used in the investigation or proceedings in this case. Also indicate whether or not items seized from the defendant were photocopied.

H. Produce and permit said defendant to inspect and copy or photograph all items referred to in preceding paragraph G and any warrants and affidavits which were used to obtain those items and any receipts relating to the obtaining of those items; list cases where warrants were upheld or convictions obtained based on the same informer.

I. State whether there has been any electronic surveillance during the investigation of this case either before or after the indictment; produce and permit said defendant to inspect and copy or photograph all recordings and transcripts resulting therefrom, and all devices and machines used in, such electronic surveillance, and describe any leads obtained by such electronic surveillance.

J. Produce and permit said defendant to inspect and copy or photograph any reports and memoranda related to this case prepared by state or local law enforcement officers including:

1. New York State Department of Taxation.
2. New York City Police Officers assigned to the 32nd Precinct.
3. New York City Police Officers assigned to Organized Crime Control Bureau.
4. New York City Police Officers assigned to Intelligence Unit.
5. New York City Police Officers assigned to Special Intelligence Unit.
6. New York City Police Officers assigned to Bureau of Criminal Identification.
7. Federal Agents assigned to the Internal

Revenue Service.

K. Produce and permit said defendant to inspect and copy or photograph any news or press releases or photographs prepared by any agency of the Government which relate to this case and the distribution list or same.

L. State the name, address and occupation of every person whom the Government expects to call as a witness, and allow the defendant to examine and inspect the "rap" or "yellow sheet"(criminal record) of each witness.

M. State whether the Government expects to show alleged prior similar acts by any of the defendants and, if so, describe in detail such alleged acts.

N. State the name and address ofevery government informer, cooperating individual, agent, employee or special employee who has any knowledge relating to this case (hereinafter referred to as a "government operative"); state the substance of any conversations between each government operative and each of the defendants or any co-conspirators and identify the participants; describe in detail any tangible objects supplied, directly or indirectly, by each government operative to each defendant and identify the persons involved; and describe in detail any acts alleged in the indictment or intended to be relief upon at trial in which a government operative was involved or which were arranged by a government operative and identify the persons involved.

O. State the name and address of every person whom the Government does not intend to call as a witness who has knowledge relating to this case or who has been interviewed on behalf of the Government in connection with this case and produce and permit defendant to inspect and copy or photograph their written or recorded statements.

P. With respect to each defendant, co-conspirator, government operative (as defined in "N" above)

and person whom the Government expects to call as a witness, specify each criminal charge which has been brought against said person, the jurisdiction, the Court and the case number, and the disposition of the charge and produce and permit defendant PAYDEN to inspect and copy or photograph all Federal, State and local arrest and conviction records of and all psychiatric reports and medical reports regarding said persons.

Q. State which co-defendants, co-conspirators, government operatives (as defined in "N" above), or persons whom the Government expects to call as witnesses have been granted or promised any immunity, favor or benefit by the United States or any of its departments or agencies, including without limitation a refusal to prosecute, limited prosecution, release on low bail, recommendation to Courts for more lenient sentences and financial maintenance, protection or other benefits to such persons or their families or friends and describe each such immunity, favor or benefit.

R. Produce and permit said defendant to inspect and copy or photograph all information and material which now is, later comes to be, or by the exercise of due diligence may come to be within the possession, custody or control of the Government which is exculpatory of or favorable to said defendant, which is important to the defense in preparation of this case for trial, which may lead to such information or material or which the Government does not expect to use at trial.

S. State the name and present assignment of each Police Agent who interviewed the defendant PAYDEN and the dates and times of such interviews.

T. State the names and present assignment of each Federal Agent who participated in the arrest and processing of defendant PAYDEN.

U. Produce and permit said defendant to inspect and copy or photograph any surveillance photographs or films of the defendants and state to whom and under what circumstances any such photographs or films were shown.

V. Produce and permit said defendant to inspect and copy or photograph any other photographs of the defendants and state to whom and under what circumstances any such photographs were shown.

W. Produce and permit said defendant to inspect and copy or photograph all statements made by co-defendants and co-conspirators that purportedly inculpate or exculpate the defendant PAYDEN.

III. Pursuant to Rules 16(b) and Rule 6(a) of the Federal Rules of Criminal Procedure, directing the said United States Attorney to produce and permit defendant, PAYDEN, to inspect and copy or photograph the transcript of testimony of all persons who testified before the Grand Jury in this case.

IV. For an Order directing the United States Attorney to produce and to allow the defendant and his counsel discovery of all evidence favorable to the defendant's case, and all evidence which would tend to exculpate the defendant as required under Brady v. Maryland, 373 U.S. 83, which is within the possession, custody or control of the United States Attorney.

V. For an Order granting inspection of the Grand Jury minutes so as to determine whether or not evidence then existing and favorable to the defendant, DONALD PAYDEN, is presented to that body.

VI. For an Order dismissing the indictment on the following grounds:

A. That the Government has failed to present legally sufficient evidence to the Grand Jury as to charges alleged in the indictment.

B. That the Government has failed to afford the defendant his constitutional right to due process

of law in the unconscionable delay between the time of the purported crime and Indictment and between Indictment and arrest.

VII. Pursuant to Rule 41(f) of the Federal Rules of Criminal Procedure, suppressing all statements, oral or written, obtained from defendant (as well as any evidence gained, directly or indirectly, as a result of obtaining the above) on the grounds that the items were obtained in violation of defendant's rights under the Fifth and Sixth Amendments of the Constitution of the United States.

VIII. For an Order forthwith ordering pursuant to Federal Rule 17 the production for in camera inspection of the complete personnel files (employment) of the agents and/or police officers involved in the instant investigation.

IX. For an Order suppressing improperly acquired identification evidence.

X. For an order granting an adjournment of the trial of defendants, PAYDEN AND VERNON, to the second week of January, 1976 or, in the alternative, for an Order pursuant to Rule 14 of the Federal Rules granting severence and separate trials upon the ground that DONALD PAYDEN is being prejudiced and deprived of the effective assistance of counsel under the sixth amendment to the United States Constitution.

III. And for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
October 31, 1975

Yours, etc.,

FINGER, GOLDBERG, ZINNER & FINGER
Attorneys for Defendant,
DONALD PAYDEN
Office & P.O. Address
404 Avenue of the Americas
New York, New York 10011
(212)228-5000
JACK G. GOLDBERG, Of Counsel

TO: UNITED STATES ATTORNEY
ANGUS MACBETH
ST. ANDREWS PLAZA
NEW YORK, NEW YORK

HONORABLE LEE P. GAGLIARDI
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
FOLEY SQUARE
NEW YORK, NEW YORK 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA	:	75CR 421
-against-	:	
DONALD PAYDEN,	:	ATTORNEY'S AFFIRMATION IN SUPPORT OF MOTION
Defendant.	:	

JACK G. GOLDBERG, an attorney, duly admitted to practice law before the Courts of the State of New York, hereby affirms the following statements to be true under the penalties of perjury:

1. That I am the attorney for the defendant herein, DONALD PAYDEN, and a partner in the law firm of FINGER, GOLDBERG, ZINNER & FINGER, ESQS. I submit this affirmation in support of defendant, PAYDEN'S, motion for the relief requested in Items I-X of the Notice of Motion. As stated below, some of the items covered by the motions for a bill of particulars and discovery have already been provided or at least promised in discussions with Angus MacBeth, the Assistant United States Attorney, in charge of the case.

2. The First Count of the indictment charges defendant with having conspired to distribute and possess with intent to distribute a controlled substance in violation of 21 U.S.C. Section 812, 841 (a)(1) and (b)(1)(B). The Second and Third Counts charge DONALD PAYDEN with non conspiratorial forms of the crime.

3. I respectfully request that the Court order the Government to furnish each of the particulars requested in the notice of

motion. As indicated by the requests, the indictment as a whole is ambiguous. But, when taken together with what it is alleged Mr. Payden is physically accused of doing in the overt act portion of the indictment, the indictment becomes preposterous.

4. The Government should be ordered to furnish all of the requested particulars because without them it would be virtually impossible to prepare a proper and adequate defense in this case and there would be a grave probability that defendant, PAYDEN, will be prejudicially surprised at trial. Moreover, if the Government fails to furnish these particulars, there is a possibility that the charges will not be clear enough so that, if there is a subsequent prosecution, the judgment in this case will be available for a plea of former jeopardy. If the United States Government could indict DONALD PAYDEN for "having a conversation" standing on the street or entering a car, then why not the State of New York? Under the apparent rush of the prosecution to try Mr. Payden, it would seem infinitely more reasonable to allow defendant, PAYDEN, to discover the requested items rather than to incur delay and grave risk of prejudice to the defendo at trial. Every effort should be made to avoid what the Second Circuit has called "trial by ambush".

5. I also respectfully request that the Court grant discovery and inspection of the transcript of testimony of all persons who testified before the Grand Jury in this case. The transcript is material to the preparation of the defense. It is

required in order to determine whether illegally obtained evidence was used by the Government before the Grand Jury and whether the proceedings before the Grand Jury were conducted pursuant to the Federal Rules of Criminal Procedure and the Constitution of the United States. Moreover, it may be required for purposes of impeachment, refreshing recollection and becoming aware of testimony favorable to the defendant.

6. As to IV, a defendant's right to discovery of favorable evidence in the possession of the Government is derived from the Fifth Amendment of the Constitution. In Brady v. Maryland, 373 U.S. 83 (1963) the Supreme Court of the United States specifically recognized a defendant's right to such evidence. Speaking for the Court, Mr. Justice Douglas said (373 U.S. at 87);

> "...We now hold that the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution."

Likewise in United States ex rel. Meers v. Wilkins, 326 F 2d 135 (2nd Cir. 1964), the Court held that a defendant was denied due process when the prosecution withheld information impinging on a vital area of the defendant's defense. (See United States ex rel. Butler v. Maroney, 319 F 2d 622, 627 (1963))

In Brady the only requestor demand by the defendant was that the prosecution produce exculpatory evidence occurred before trial.

7. Accordingly, it is evident that the thrust of the Supreme Court's decision was to find in the due process requirements of the Constitution an important pre-trial discovery right for a person accused of a crime. (See, also United States v. Pratello 44 FRD 444, 4.2 (CELY 1963)). The Brady doctrine in some jurisdictions has recently been expanded to apply to Grand Jury proceedings. In Johnson v. Superior Court, decided September 19, 1975, 13 CRL. 2054, that Court dismissed an indictment as a result of a prosecutor's failure to present favorable evidence to a Grand Jury. In the instant case, it is more than unlikely that exculpatory evidence was prescribed to the Grand Jury. For this reason, the relief requested in Item V should be granted.

8. As to Item VI, my reading of the indictment and conversations (of a somewhat limited nature) with Mr. MacBeth, indicate nothing more than DONALD PAYDEN'S being in the vicinity of a purported drug transaction. As a matter of fact, there appears to be no evidence that Mr. Payden had any dealing with the apparent undercover officer or Mr. Vernon. I find it hard to believe that a Grand Jury would indict because DONALD PAYDEN talked with someone or associated with a criminal element. As to the second portion of Item VI, it is alleged that the defendant sold drugs during the month of August, 1974. That although the defendant's identity was obviously known to the police and prosecuting authorities in August, 1974 and thereafter, no attempt was made to arrest the defendant until October 21, 1975. No attempt was made to indict Mr. Payden

until April, 1975.

9. That it would be utterly absurd and impossible to suggest that the defendant would be in a position to adequately defend himself against the charges, or to obtain witnesses, or to establish any alibi as of the date, time and place when it is alleged that the crime took place.

That by failing to expeditiously proceed against the defendant, the Government effectively deprived the defendant of due process of law.

In the case of Dickey v. Florida, 398 U.S. 30, the Honorable Justice of the Supreme Court, Justice Brennan, wrote lengthy concurring opinion with regard to rules that should be followed in cases pertaining to speedy trials, and the following are excerpts therefrom:

> "The passage of time by itself, moreover may dangerously reduce his capacity to counter the prosecutor's charges. Witnesses and physical evidence may be lost; the defendant may be unable to obtain witnesses and physical evidence yet available. His own memory and the memories of his witnesses may fade." (P. 42.)
>
> "Deliberate governmental delay in the hope of obtaining an advantage over the accused is not unknown. In such circumstances, the fair administration of criminal justice is imperiled. The Speedy Trial Clause then serves the public interest by penalizing official lawlessness." (P. 43.)
>
> "A criminal prosecution has many stages and delay may occur during or between any of them. It may take place at the beginning of the process; between the time at which the government

decides to prosecute a man and has sufficient evidence to proceed against him and the actual time of his arrest or indictment." (P. 43.)

"...we have held that the prosecution of an accused can begin before his indictment..." (P. 44.)

"Accordingly, some of the interests protected by the Speedy Trial Clause can be threatened by delay prior to arrest or indictment." (P. 46.)

"The legislature is free to implement the (speedy-trial) right and to provide protections greater than the constitutional right. But the minimum right of the accused to a speedy trial is preserved by the common of the Sixth Amendment, whatever the terms of the statute." (P. 47.)

"Despite the difficulties of proving, or disproving actual harm in most cases, it seems that inherent in prosecutorial delay is "potential substantial prejudice" U.S. vs. Wade, 388 U.S. 213 227 (1967) (P. 54.)

"...prejudice may fairly be presumed simply because everyone knows that memories fade, evidence is lost, and the burden of anxiety upon any criminal defendant increases with the passing months and years." U.S. vs. Mann, 291 F. Supp. 268, 271 (1968) (P. 54.)

"When the Sixth Amendment right to speedy trial is at stake, it may be equally realistic and necessary to assume prejudice once the accused shows that he was denied a rapid prosecution." (P. 55.)

See also, U.S. v. Ewell, 1966 383 U.S. 116, 122; Ross v. U.S. CA 1965. 349 F 2d 210; Woody v. U.S. CA 1966, 370 F 2d 214; Jones v. U.S. CA 1968, 402 F 2d 639; U.S. v. Lee 7th C.A. 1969, 413 F 2d 910.

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10. As to Item VII, I respectfully request the suppression of all statements, oral or written, obtained from defendant, PAYDEN, (as well as any evidence gained, directly or indirectly, as a result of obtaining the above) on the grounds that the items were obtained in violation of his rights under the Fifth and Sixth Amendments. Upon information and belief, defendant, PAYDEN, does not recall receiving the full warnings required by the Constitution immediately after his arrest. I respectfully request that a hearing be held on the day of trial, prior to its commencement, to resolve this issue.

11. With the indictment and subsequent convictions of almost all of the members of the "Elite" New York City Police Department Special Intelligence Unit, it became apparent that many police officers engaged in narcotic enforcement were acting illegally and, in fact, dealing in drugs themselves. These type of activities were not limited to the New York City Police Department and, as a matter of fact, one only has to look at the daily newspaper to find reports concerning the Federal Bureau of Narcotics and Dangerous Drugs. It is for the reasons stated above that it is almost incumbent upon any Justice to examine the personnel historyand employment records of all of these officers testifying in a case involving narcotic enforcement.

12. As to Item IX, even Police Officers who are trained in the techniques of observation can be mistaken with regard to the identity of persons they arrest. These mistakes on many occasions

crop up when the ability to observe is somewhat curbed by the distance and the manner in which the officer is secreted. My client has informed me that he knows of no line-up, show-up or any other means of identification used in his arrest. It is for these reasons that defendant is requesting a hearing so as to determine whether or not the arresting officers arrested the proper individual. Stovall v. Denno, 388 U.S. 293, U.S. vs. Simmons, 390 U.S. 327 are some examples of cases wherein an identification was tainted by illegal means. I believe there can be no distinction drawn between a civilian and a police officer in so far as their abilities to be mistaken. As a matter of fact, police officers are routinely making observations and are called upon to make many more and record many more observations than a civilian would be. As a result, they can become confused and often times are mistaken. An erroneous identification can do irreparable harm and, in many cases, does. It is for these reasons that the defendant requests a hearing to determine the manner and means of his identification.

13. As to Item X, the defendant, DONALD PAYDEN, was arrested on October 21, 1975, for crimes that occurred during the month of August, 1974. This office appeared for Mr. Payden on Wednesday, October 22, 1975. On that date, my partner was informed that the trial was to commence on Tuesday, October 28, 1975, before the Honorable Justice Lee P. Gagliardi. Since, I, myself, was engaged in a motion to suppress, it wasn't until the weekend that I actually had time to review the most important facts. Appearing

before the Honorable Jackie Cogliardi on October 28, 1975, I requested an adjournment and the matter was again marked for trial on Friday, October 31, 1975. It is apparent that the Government wants to rush the case in that they are up against the ninety (90) day rule in connection with their prosecution of Billy Vernon, a co-defendant in the matter. Nevertheless, I do not feel that I have to sacrifice a properly conducted investigation so that the Court and the United States Attorney's Office can expedite this matter. The United States Attorney's Office feels that it is more important to try both cases at the same time than to try Mr. Payden at a later date, thus preserving his right to a fair trial and a fair investigation prior to the commencement of that trial. Their statements in Court indicate that this is a very simple case as far as they were concerned and they see no reason why Mr. Payden could not go to trial immediately. Nevertheless, it has taken their office some fourteen (14) months to bring the case where it is now and, more than that, their own tardiness is no more evidenced than by the fact that Mr. Vernon falls nearly without the ninety (90)day rule. I have repeatedly requested a January date because of other commitments I presently have, but have only been granted a reprieve a day by day basis. Perhaps the United States Attorney's Office does not understand that this is not my only case and that I represent defendants incarcerated in State Courts for in some instances upwards of a year. I am in the process now of speaking with witnesses to ascertain Mr. Payden's whereabouts during the

summer months of 1974. I have also found it difficult to reach a chemist who I used in prior occasions and in whom I feel confident enough to analyze the contraband in the instant case. I have no authority to tell independent contractors that they are to immediately proceed to the United States Attorney's Office and examine in their office contraband. I also cannot order people out of State to come in so that I may speak with them and try to refresh their recollection as to events occurring almost fourteen (14) months' ago.

14. I have been reminded that I must meet the ten (10) day rule for motions and this, despite the fact that just two (2) days I was told that I could make all my motions orally. When it became apparent that I could not try another case for which I was preparing, namely, United States of America v. John DeBenedictus before Judge Yorker (a case that it has been adjourned by the Government for nine (9) months and in violation of the ninety (90) day rule) and was just adjourned again at their request. I was ordered to try this matter on November 10, 1975 or some two and half weeks from the time of Mr. Payden's arraignment.

15. I have received very little cooperation from the Government although the United States Assistant Attorney has given me a copy of the indictment, a copy of my client's interview, a copy of my client's rap sheet, however, he has failed to provide me with a lab report and arrest report. I am cognizant of the fact that Mr. Macbeth might feel that some of the material amounts to

Rule 3500 material but, nevertheless, on prior occasions I have been shown this material even months in advance of trial.

16. I am not an attorney who shuns the Courtroom, as a matter of fact, I try as many as fifteen (15) jury trials a year, however, I have never been put in the position that I have been in connection with the instant matter. I have repeatedly requested that this matter be adjourned to the second week of January, 1976, and now I request pursuant to Rule 14 of the Federal Rules of Criminal Procedure that Donald Payden be granted a severance and be given a separate trial upon the ground that he is being prejudiced by the fact that the United States Attorney's Office feels it of uppermost importance to try both defendants within ninety (90) days despite the fact that one was only arraigned two and a half weeks prior to the completion of the other's ninety (90) day period. I can state that I am being pressed and rushed and consequently feel that my client is being deprived of the effective assistance of counsel under the Sixth Amendment of our Constitution.

WHEREFORE, the defendant respectfully requests that the Court grant all the items requested in his notice of motion and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
October 31, 1975

JACK G. GOLDBERG

Redacted Indictment

(Conspiracy to distribute and possess with intent to distribute narcotic drug.)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Docket Number 75 Cr. 421 (LPG)

UNITED STATES OF AMERICA,

—v.—

DONALD PAYDEN, a/k/a Country, BILLY VERNON,
Defendants.

The Grand Jury charges:

1. From on or about the 1st day of August, 1974, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, Donald Payden, a/k/a Country, Billy Vernon, the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York.

1. On or about August 6, 1974, at approximately 9:45 p.m., Billy Vernon, the defendant, met two people in front of 125 West 116th Street, New York, New York.

2. On or about August 6, 1974, at approximately 9:55 p.m., Donald Payden, a/k/a Country and Billy Vernon, the defendants, had a conversation across the street from 356½ West 145th Street, New York, New York.

3. On or about August 6, 1974, at approximately 10:20 p.m., Billy Vernon, the defendant, possessed approximately 27.2 grams of cocaine in front of 356½ West 145th Street, New York, New York.

4. On or about August 27, 1974, at approximately 6:25 p.m., Donald Payden, a/k/a Country and Billy Vernon, the defendants entered 356½ West 145th Street, New York, New York.

5. On or about August 27, 1974, at approximately 7:10 p.m., Donald Payden, a/k/a Country and Billy Vernon, the defendants, had a conversation in front of 356½ West 145th Street, New York, New York.

6. On or about August 27, 1974, at approximately 7:15 p.m., Donald Payden, a/k/a Country and Billy Vernon, the defendants, entered an automobile in the vicinity of 356½ West 145th Street, New York, New York and drove away.

7. On or about August 27, 1974, at approximately 8:45 p.m., Billy Vernon, the defendant, possessed

approximately 53.2 grams of cocaine at Jimmy Daniel's Bar and Grill, 118 West 116th Street, New York, New York.

COUNT TWO

The Grand Jury further cha[illegible]s:

On or about the 6th day of August, 1974 in the Southern District of New York, Donald Payden, a/k/a Country and Billy Vernon, the defendants, unlawfully. wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 27.2 grams of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841 (b)(1)(A).)

COUNT THREE

The Grand Jury further charges:

On or about the 27th day of August, 1974, in the Southern District of New York, Donald Payden, a/k/a Country and Billy Vernon, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 53.2 grams of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841 (b)(1)(A).)

COUNT SIX

The Grand Jury further charges:

On or about the 3rd day of October, 1974, in the Southern District of New York, Billy Vernon, the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotics drug controlled substance, to wit, approximately 55.5 grams of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841 (b)(1)(A).)

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

Plaintiff, :

V. : 75 CR. 421

DONALD PAYDEN, :

Defendant. :

----------x

November 3, 1975
3:30 p.m.

BEFORE:

HON. LEE P. GAGLIARDI,

District Judge

A P P E A R A N C E S:

ANGUS MacBETH, ESQ.
Assistant U.S. Attorney

JACK GOLDBERG, ESQ.
Attorney for defendant

ooo

(Case called.)

MR. MacBETH: Ready for the Government.

MR. GOLDBERG: Ready for the motion, your Honor.

THE COURT: All right. Let's go right through item by item.

MR. MacBETH: Your Honor, I, of course, received the copy of the motion papers about two hours ago so that I haven't had a chance to offer any written response but I can simply go through them.

As to I item A1, the Government would take the position that that is in the indictment and so much as is not in the indictment asks for the Government's evidence or the Government's legal theory and the Government opposes it.

THE COURT: You can give him the time during which he was alleged to be a member of the conspiracy.

MR. MacBETH: That is set out in the indictment. It's essentially August and September of 1974.

THE COURT: August 1, 1974 to when?

MR. MacBETH: To September 30, 1974.

THE COURT: All right.

Where and in what manner I will deny.

MR. MacBETH: Item II, names and addresses and occupation of co-conspirators. The only co-conspirator is

Billy Vernon, the only other defendant in the case.

THE COURT: All right. Right now confined in the Manhattan Detention Center.

MR. MacBETH: That is correct.

THE COURT: What was his known address at the time other than that?

MR. MacBETH: The address he gave at the time of his arrest was 148 Brook Avenue, Bronx, New York.

THE COURT: And what was his occupation?

MR. MacBETH: The occupation which he gave at that time was that he was employed by French Superette, 68 West 116th Street.

THE COURT: All right. Whether or not they were known to the grand jury at the time of the filing of indictment, I do not require you to furnish that information.

MR. MacBETH: Thank you.

THE COURT: Item III. The only co-conspirator is Billy Vernon.

MR. MacBETH: Describe the method and means by which overt acts 1 to 7 were performed, and that asks for Government evidence and theory of the case and the Government would oppose granting that information.

THE COURT: I will uphold the Government's position with respect to Item IV. If you have any argument

about this, Mr. Goldberg, you are welcomed to stand up and argue them.

MR. GOLDBERG: With respect to that particular item from a reading of the indictment and the overt acts that seem to be imputed to Mr. Hayden, there seems to be no criminality spelled out.

THE COURT: There doesn't have to be criminality in an overt act. It can be an innocent charge to the jury. It can be something that by itself is perfectly innocent, legal and so forth. There is no requirement that an overt act be accompanied by any criminality.

MR. MacBETH: As to Item V, composition, qualitative and quantitative amounts of the controlled substances referred to in the overt acts, I have provided Mr. Goldberg this afternoon with a copy of the lab report on the substances and that is stated in the lab report.

THE COURT: Do you have any objection to furnishing the form of the substances of the containers in which they were located?

MR. MacBETH: The containers in which they were located is also described in the lab report and the form--it depens what he means by the form and the substance.

THE COURT: Granular?

MR. MacBETH: Yes.

Item VI, describe all overt acts not specifically enumerated and set forth in the first count, that again asks for the Government's facts and for its theory of the case and the Government opposes that.

THE COURT: Do you expect to prove any other overt acts other than the ones set forth in the indictment?

MR. MacBETH: Yes, in the sense that on those dates the defendants did other things. There are further conversations, further actions it can take. To set forth every act they did in that period in furtherance of the conspiracy would be to set forth everything that we know about what happened on those days.

THE COURT: I will sustain the Government's position with respect to Item VI.

MR. MacBETH: Item VII, as to the defendant, Payden, describe, in terms sufficient to identify the facts for the purpose of defense, the acts or statements deemed by the Government to be indicative of an instant intent to distribute a controlled substance. That asks for the Government's legal theory of the case. It may also ask for 3500 material and in either case the Government opposes the motion at this time.

Insofar as its 3500 material that will be turned over prior to the testimony of the witness on the stand.

THE COURT: All right. I confirm your analysis of Item VII. I don't require you to furnish it.

MR. MacBETH: Item VII, state in what manner each overt act furthered the object of the conspiracy. That clearly asks for the Government's legal theory.

THE COURT: All right, denied.

MR. MacBETH: B1, state whether defendant Payden is alleged to have distributed the controlled substances as a principal and whether he is alleged to have aided, abetted, counseled, commanded, induced, procured or willfully caused the distribution of the substances. That asks for the Government's legal theory and the Government opposes that.

THE COURT: I think you have to know what he is being charged on the offense for aiding and abetting.

MR. MacBETH: It took place as part of the conspiracy.

THE COURT: Count 2 does not allege, Section 2, does it? Nor does Count 3.

MR. MacBETH: No, it does not.

THE COURT: You are not charging him with being an aider and abettor.

MR. MacBETH: He would be charged as a principal and as a part of the conspiracy.

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THE COURT: It's not a conspiracy, these are substantive counts, 2 and 3.

MR. MacBETH: He is charged as a principal.

THE COURT: All right.

MR. MacBETH: State whether defendant Payden is alleged to have possessed the controlled substances with intent to distribute it, as a principal, and whether he is alleged to have aided, abetted, counseled, commanded, induced, procured or willfully caused possession of the substances with intent to distribute it. He is again charged as a principal.

THE COURT: All right.

MR. MacBETH: 3, state the exact times and places when the alleged offense occurred, the names and addresses of the persons to whom the controlled substances are alleged to have been distributed, the names and addresses of any co-conspirators or other persons assisting in or present during the commission of the alleged offenses and the names and addresses of the persons from whom it is alleged the defendant obtained the controlled substances if known by the Government.

Vernon is the only other known co-conspirator.

B2 THE COURT: Can you give me the approximate time?

MR. MacBETH: Those are essentially the times of the overt acts. They are the evenings of the two dates given, August 6th and August 27th.

THE COURT: All right. What about the place?

MR. MacBETH: The places are all in Manhattan.

THE COURT: They aren't too involved.

MR. MacBETH: There is evidence of Vernon being in various places. Payden, the evidence will show, was at the address given in the overt acts and also certain movement in an automobile.

THE COURT: Is that satisfactory, Mr. Goldberg?

MR. GOLDBERG: Yes, your Honor.

THE COURT: Very well.

MR. MacBETH: 4, describe the method or means by which the alleged offenses were committed by each person committing or assisting in the commission of the offenses, including without limitation how each person distributed or possessed the controlled substances.

That asks for the Government's legal theory.

THE COURT: Yes, it does.

MR. MacBETH: 5, state the strength of the controlled substances and describe the form of the substances and the container in which it was located.

THE COURT: That has been furnished.

MR. GOLDBERG: That has been furnished.

MR. MacBETH: 6, as to the defendant, describe, in terms sufficient to identify the facts for the purpose of defense, the acts deemed by the Government to be indicative of an intent to distribute controlled substances. That asks for the Government's legal theory.

THE COURT: Denied.

MR. MacBETH: C, with respect to all counts:

1. State the manner, time, place and date of the arrest of the defendant. I think the Government opposes that on the grounds it's improper in a bill of particulars. It in no ways goes to the defense of the trial.

MR. GOLDBERG: I made that application on the grounds that I was in Mr. MacBeth's office and I asked to see a copy of the arrest report and he said he didn't have one at that time. That is why I included it in here.

MR. MacBETH: If what Mr. Goldberg means by the arrest report is the report by the agent of what happened at the time Mr. Payden was arrested I don't have that.

THE COURT: You know when he was arrested?

MR. MacBETH: Yes, October 21st, as Mr. Payden knows too. I don't have any report from the agency at this time.

THE COURT: He was arrested October 21st where?

MR. MacBETH: At his home on Beach Avenue in the Bronx.

THE COURT: That is sufficient, isn't it?

MR. GOLDBERG: For that particular, yes, your Honor.

MR. MacBETH: State the time, place and procedure by which the defendant was identified at the time of his arrest.

Again the Government contends that is improper for a bill of particulars.

THE COURT: I agree with you. It doesn't have anything to do with the bill of particulars.

Do you have any objection to furnishing the information?

MR. MacBETH: I haven't had a chance to call the agent and ask how they identified him. I didn't know there was any question but that this was the defendant.

THE COURT: I think what he is searching here for is if there is any basis upon which to make a suppression motion as far as identification is concerned.

MR. MacBETH: I want to check with the agent. I don't believe any photographs were used or there was any lineup or showup. But I will check to be sure.

THE COURT: All right. I don't think that is

necessary for you to furnish as far as a bill of particulars is concerned, but as far as furnishing that information I don't see you should have any objection to doing it. That will take care of that item.

MR. MacBETH: 3, state the reasons, if any, for it to take 14 months for the Government to arrest Donald Payden.

I have had a report dated October 31st from the DA agent furnished to me and among other things it states that attempts were made to locate and apprehend the defendant Payden on the following dates by police officer Hargaton: June 3, 1975. June 5, 1975. August 12, 1975. August 15, 1975. August 26, 1975. August 28, 1975. September 8, 1975. September 10, 1975. September 25, 1975.

So there were very considerable efforts made to locate Mr. Payden well before his arrest on October 21st. The indictment indicates, of course, came down at the end of April so that it's not a case which the Government has not made any attempt to locate Mr. Payden.

MR. GOLDBERG: May I just state that I have spoken to my partner, Howard Finger, who had known Mr. Payden, I believe, for a year's time or somewhere thereabouts and he had indicated--Mr. Payden indicated to Mr. Finger in the spring of last year, spring of 1975, this year, that

somebody in his apartment house had indicated to Mr. Payden that somebody was looking for him and he told that to my partner who called up the special drug prosecutor here in New York, the State prosecutor, and the Federal authorities to ascertain whether, in fact, that was true and he received no response, no communication from them as to whether or not any warrant or any type of service was attempted to be effectuated against Mr. Payden. That is why that particular was asked and I wanted to know what efforts, not so much as to say the efforts weren't made, but I believe they have substantially taken time between the act and the arrest.

THE COURT: All right. You may give the information as to when they arrested him.

MR. MacBETH: This really has nothing to do with the bill of particulars.

THE COURT: It doesn't but we might as well clear everything up that we can here.

MR. MacBETH: 4, set forth the amounts and denominations of moneys allegedly used as payment, if any.

That asks for the Government's evidence and the Government opposes that application.

THE COURT: Yes.

MR. MacBETH: 5, state the exact time, place and

date of the arrest of all co-defendants. That has nothing to do with the bill of particulars.

THE COURT: The only co-defendant we are concerned with is Billy Vernon and I don't think you had shown any objection to furnishing that. He has been in jail for almost three months.

MR. MacBETH: He has been held longer than that, your Honor. He was held on another case. He was arrested on November 5, 1974.

THE COURT: Not pursuant to this indictment.

MR. MacBETH: No, pursuant to a charge of assault on a Federal officer, completely unrelated to this case.

THE COURT: Yes.

MR. MacBETH: I could--

THE COURT: All the other defendants are fugitives.

MR. MacBETH: That is correct. If your Honor wishes I can provide further details on Mr. Vernon by consulting the FBI reports in the other case.

B3 THE COURT: I don't think it's necessary for a bill of particulars.

MR. MacBETH: 6, state whether or not any co-defendants have made any self-inculpatory statements or self-exculpatory statements or statements that would

exculpate the defendant, Payden.

Insofar as that asks for Brady material, the Government will supply Brady material.

THE COURT: Do you have any Brady material?

MR. MacBETH: We have nothing that is exculpatory to the defendant Payden.

THE COURT: Very well. Under my interpretation of Brady you are supposed to have supplied that forthwith to the defendant. You have no Brady material. All right.

MR. GOLDBERG: May I just say this: I was privy to a colloquy, I believe the first or second time this case was on for trial, where Mr. Myers, I believe co-counsel, indicated that certain statements were made by Mr. Vernon to various law enforcement officials.

It was indicated that at one time Mr. Vernon was going to cooperate and then he changed his mind when certain things transpired which dimmed the hope on his part to cooperate.

Nevertheless, I feel certain, I think that it should be done, that those statements should be looked at toward a view of their effect in what was said if there were questions and answers pertaining to Mr. Payden.

THE COURT: Only if they are exculpatory.

MR. GOLDBERG: That is what I am saying, your

Honor. If he was asked a question, for example, did you and Mr. Payden on August 27th or August 6th conspire to violate the narcotics laws of the United States of America, and he said no, I believe that is exculpatory.

THE COURT: What do you have to say, Mr. MacBeth?

MR. MacBETH: First of all, your Honor, there are no records of these interviews. Interviews were had between Mr. Payden and agents of the DEA and the State and City police but there are no records.

On Mr. Myers' application I made a diligent search for such records and there simply are none. That is the short and simple answer to that. There are records of discussions with Mr. Payden about the possibility of cooperation but they go only this far: He is informed of his rights. He is told no promises, no threats and so on.

There are no records of any statements made. Those have been furnished to Mr. Myers. I don't think any of them are exculpatory as to Payden. Mr. Goldberg can obtain them from Mr. Myers if Mr. Myers will allow him to see them.

THE COURT: All right. Very well.

MR. MacBETH: 7, state whether or not such statements that would exculpate Donald Payden were introduced

before the grand jury.

The Government has no information that would exculpate Donald Payden.

THE COURT: All right.

MR. MacBETH: 8, set forth as accurately as possible the language used by any co-defendant that allegedly incriminates Donald Payden.

That asks for the Government's case.

THE COURT: All right. You are not required to furnish that. We have an awful lot of items in here. I don't want you to read them all.

Do you have an extra copy of your papers?

MR. GOLDBERG: I only have one left. I furnished your Honor with an original and a copy. I don't know what happened to Mr. MacBeth's original--

THE COURT: I have the original.

MR. GOLDBERG: I sent the U.S. Attorney a copy.

THE COURT: He referred to them by item and tell me what your position is with respect to them.

MR. MacBETH: I am only reading them because there are so many.

THE COURT: This is subdivision II Item A.

MR. MacBETH: This asks for any statements or confessions made by the defendant.

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MR. GOLDBERG: I will concede that the Government has supplied me with a four-page statement.

THE COURT: All right.

MR. GOLDBERG: If that is all there is--

THE COURT: You have furnished to the defendant what you have with respect to that item, correct, Mr. MacBeth?

MR. MacBETH: I have furnished the statement.

THE COURT: 2B.

MR. MacBETH: That goes to evidence presented before the grand jury by the defendant. The defendant did not appear before the grand jury, as Mr. Goldberg knows.

The next one asks for physical or mental examinations and scientific tests including psychiatric reports on Federal, State and City police officers or special agents.

Insofar as any of that would be 3500 material the Government would produce that prior to the witness going on the stand. Otherwise, I know of no basis under Rule 16 to ask for such material and the Government opposes supplying any such material.

MR. GOLDBERG: I am not asking to see these records at the present time, in other words, at this stage of the proceedings.

However, I am asking if it can be further noted

from another demand I made that the psychiatric profiles or records of these police officers along with any personal records be examined by your Honor at the time that these gentlemen, police officers, agents, take the witness stand so that if in fact there are some elements that would affect their credibility, their ability to testify such as their psychiatric makeup, whether or not they received any help psychologically, I think these would affect their ability to be a witness, their ability to observe, and their ability to make judgments and for that reason I don't ask to see them, I ask your Honor to look at them.

THE COURT: I think the time to see it is when they are called as a witness and if there are any such things Mr. Goldberg is satisfied that you turn them over to me.

MR. MacBETH: Let me also inquire whether any such material exists.

THE COURT: If nothing exists there is nothing you can turn over.

He is making a blanket request. Do you have any information?

MR. GOLDBERG: No, your Honor, except I do know that as far as the officers and personnel history would exist, and it is a practice, your Honor, that the defense

attorney is not given these records but that the judge in camera looks them over to determine whether there is anything of value so far as their ability or their credibility to be a witness.

THE COURT: Doesn't that come under Brady?

MR. MacBETH: Yes, but if it is Brady material, if it is exculpatory that is a decision that has to be made by the Government.

THE COURT: Anything favorable to the defendant in the presentation of the case has to be turned over, anything that is favorable to the defense.

MR. MacBETH: What the defendant here is asking for is entire personnel records of each one of these police officers.

THE COURT: I am not going to require you to go out and get them.

MR. GOLDBERG: All I am asking, if your Honor signs a subpoena I will serve that subpoena and the records will be brought to you. They will never, under any circumstances, give me those records nor will they deliver them to the Court. They will deliver them to you personally, your Honor. That is the practice. They won't give them to Mr. MacBeth as well. That is why as far as the Brady effect on the records he won't have the opportunity to

examine them to determine whether or not there is anything in there that might aid in Mr. Payden's defense or aid or mitigate the charges.

MR. MacBETH: I don't believe there is any subpoena power generally under the Brady case and Brady material obviously is material that the Government has and has in its custody.

THE COURT: He is saying you don't have it. That is all he is saying. There is no obligation on your part to furnish it.

He is asking me to issue a subpoena for the records of any police officers or special agents who do testify and that the employer submit those records to me, that I look at them and see if there is anything that might be of help to him in connection with his cross examination.

MR. GOLDBERG: Correct.

THE COURT: That doesn't belong in here as discovery. That belongs as a separate item that should be sent to me. All right.

MR. MacBETH: The next item, D, goes to allowing the defendant to inspect a copy of the photograph books and papers, et cetera, related to each of the following matters, first, the conspiracy alleged in paragraph 1 of the indictment.

The only tangible objects are the cocaine, the narcotic substance. I am perfectly willing to have Mr. Goldberg come and look.

MR. GOLDBERG: May I say this: I spoke to my chemist this morning. He is in the laboratory of chromotography. I am not that familiar with the method that he uses in analyzing these but he has indicated to me one thing that might cause a problem in the case.

It seems to me on prior occasions he has gone to the Federal authorities and sought and examined drugs or contraband and he says that the Federal authorities would not allow him to use their equipment including one particular piece of equipment that he needs and that is a spectroscopic graph.

It seems the Feeeral authorities are in possession of such a machine but they will not let him use it and, as a result, the test he would want to make could not be made certainly in their office let alone their laboratory because of their refusal and the test can only be made in his laboratory which is in Queens.

Maybe the policy is changed. I asked him when was the last time he had to analyze Federal contraband and he indicated to me it was quite sometime ago.

MR. MacBETH: I don't know the answer to that.

this is the first I have heard of this problem. Obviously the Government will strenuously pose the evidence leaving the DEA lab or the custody of the United States Attorney's office. We are willing to allow--

THE COURT: Will you let him use your spectrogram or spectroscope, whatever it is?

MR. MacBETH: I simply don't know what the reasons the DEA has--

THE COURT: Find out and let Mr. Goldberg know.

MR. GOLDBERG: He asked me to get back to him tomorrow morning or this afternoon.

THE COURT: All right. Is that the only thing offered by Item D?

MR. MacBETH: Yes, it is.

THE COURT: And all of its subdivisions?

MR. MacBETH: Yes, that is the only tangible part.

MR. GOLDBERG: That is the only tangible piece of evidence.

THE COURT: Item E, statements or confessions made by anyone. That is 3500 material which will be turned over. E is 3500 material and the Government will comply with its obligations under the Jencks Act.

F. That is grand jury and I will deny that.

G. That is asking for your evidence. I deny G.

H. Same thing, same ruling. There is no electronics.

MR. GOLDBERG: Assuming there are no warrants of any sort. I believe I would be entitled to examine warrants.

MR. MacBETH: Only the arrest warrants.

THE COURT: All right.

I. You represent there was no electronics surveillance of any kind.

MR. MacBETH: That is correct.

THE COURT: Very well. J.

MR. MacBETH: This is 3500 material.

THE COURT: 3500 material which will be turned over at the time required by law. I say you are going to turn it over before the witness takes the stand.

MR. MacBETH: Yes.

THE COURT: Good. K, news and press releases.

MR. MacBETH: I know of no news or press releases.

MR. GOLDBERG: I don't remember any either.

THE COURT: K, there are none that you are aware of.

L. The witness list and the rap sheet.

MR. MacBETH: The Government is opposed to this application in granting a list of the Government's witnesses.

THE COURT: That is required now, isn't it?

MR. GOLDBERG: Yes, sir. That is my understanding.

THE COURT: That is required now.

MR. MacBETH: The new rules become effective only on the 1st of December of this year.

THE COURT: I thought it was the 1st of September.

MR. MacBETH: I was told the 1st of December.

THE COURT: In the last case I had the U.S. Attorney furnished the defendant with a witness list.

MR. MacBETH: I would be happy to check but it was my understanding that those have been adjourned until the 1st of December and further there is a memorandum on office policy two days ago that before any witness list be provided it should be cleared in a consultation with the chief of the criminal division. I would have to do that. I believe those rules are adjourned.

THE COURT: Check that out. Any witness you do have and you will produce you will have available the rap sheet.

MR. MacBETH: Yes.

THE COURT: All right. Prior similar acts.

MR. MacBETH: The Government does not intend to show prior similar acts.

THE COURT: All right. N.

MR. MacBETH: This again asks for the defendant's evidence. Insofar as it asks for informers, there is an informer's privilege which is set out in U.S. versus Sols, 482 F2d 105 and unless there is a compelling showing by defendant the Government opposes making any of this information available.

MR. GOLDBERG: What I am getting at, your Honor, if this cooperating individual was present during a particular transaction I don't believe that privilege would carry.

MR. MacBETH: Your Honor, we will not disclose who the confidential informant is voluntarily. We will turn over his statement as 3500 material.

THE COURT: All right. Item O.

MR. MacBETH: Just so the record is clear on that, also we do not intend to call the confidential informant at trial and we do not know where he is at the present time.

MR. GOLDBERG: May I have his last known address so I may try to call him and contact him?

MR. MacBETH: The Government opposes revealing the identity of the informant.

THE COURT: All right. You are supposed to give

me the information, right?

MR. MacBETH: I will do that, your Honor.

THE COURT: In camera.

MR. MacBETH: Yes, sir.

THE COURT: Item O.

MR. MacBETH: The only person who would fall under Item O is the confidential informant.

THE COURT: All right. Item P.

MR. MacBETH: Let me return for a moment to Item O. With the exception perhaps of some of the surveillance agents the Government would oppose providing complete lists of all those names.

THE COURT: I wouldn't require you to do that. What about Item P?

MR. MacBETH: I believe this is already covered.

THE COURT: This is covered in the previous matters about the rap sheet, the witnesses called, isn't it, Mr. Goldberg?

MR. GOLDBERG: Yes, your Honor, it's covered.

THE COURT: Q.

MR. MacBETH: The only thing that could possibly --apart from the--

THE COURT: You answer the question to some extent.

MR. MacBETH: As far as it goes to witnesses who will testify it will be provided as 3500 material or as Brady material. Beyond that, the Government opposes it.

B5 THE COURT: All right. I regard it as Jencks rather than Brady. Item R.

MR. GOLDBERG: Does that mean I am only going to get that information when the witness testifies?

THE COURT: He is going to hand it to you before the witness testifies.

MR. MacBETH: R seems to be another Brady request.

THE COURT: It seems to be.

MR. MacBETH: The Government will comply with Brady obligations.

THE COURT: You say you don't know of any Brady.

MR. MacBETH: That is correct.

THE COURT: S.

MR. MacBETH: The Government opposes that.

THE COURT: He just wants to know which Federal agent interviewed Payden and dates and times of such interviews. He wants that and see whether or not they took any statements.

MR. MacBETH: I was one such Government agent and that statement has been given to Mr. Goldberg. I know of no other statement. I will check again with the agents

present at the time of the arrest.

MR. GOLDBERG: I am not so much interested in the statements. I will take Mr. MacBeth's word that he is giving me--

THE COURT: You want to know who interviewed him.

MR. GOLDBERG: Yes.

MR. MacBETH: I will check with the agents who were present at the arrest. I am not sure exactly who conducted an interview, if anyone did.

THE COURT: Get that information to him promptly. T.

MR. MacBETH: That would be the same.

THE COURT: S and T is the same.

MR. GOLDBERG: I will be supplied that?

THE COURT: Yes. U, surveillance photographs or films.

MR. MacBETH: There are no surveillance photographs or films.

THE COURT: All right. V.

MR. MacBETH: There were no photographic spreads used in this case.

THE COURT: All right. W. That is akin to Jencks and Brady.

MR. MacBETH: Yes.

THE COURT: III, 16B. That asks for grand jury testimony--

MR. MacBETH: The Government opposes that.

THE COURT: I wouldn't require you to turn over grand jury material other than as required under Jencks or Brady.

MR. MacBETH: 4 is a Brady request again.

THE COURT: All right. We have covered that already. Item 5.

MR. MacBETH: The request again to inspect the grand jury material.

THE COURT: That is denied. Item 6.

MR. MacBETH: The Government has failed within legally sufficient evidence to the grand jury as charges allege in the indictment and the Government contends there that exclusionary rule does not apply to any evidence before the grand jury citing United States versus Collandra, 414 U.S. 338, 1974. And there is no basis for this. Collandra says that an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence.

The Government opposes it on the basis of that case.

THE COURT: Yes.

MR. MacBETH: As to the unconscienable delay in Item B, the Government contends there has not been an unconscionable delay. The events took place in August 1974.

The indictment was handed down in April 1975 and that period of delay is not unconscienable and there has been no showing of prejudice by the defendant during that period of delay.

As to the period between the indictment and the arrest the dates to attempt to find Mr. Payden that I provided early in the hearing is ample evidence that the Government made efforts to find Mr. Payden and delay during that period was not the fault of the Government.

MR. GOLDBERG: I don't know what they did to Mr. Payden. But that could be dialing a phone number, his last number.

THE COURT: I don't see there is any real problem with that, Mr. Goldberg.

MR. GOLDBERG: Sometimes so much time passes that you cannot find that prejudice that might exist if in fact he had been found earlier.

THE COURT: I don't see it in here. The offense was committed in August of 1974, the indictment filed April 28, 1975. That is not an inordinately long period

of time.

MR. GOLDBERG: Six months from hence to when he was arrested.

THE COURT: They filed a statement of readiness here within a six month period of time.

MR. MacBETH: And consistent efforts to find the defendant.

THE COURT: You have four defendants here and two of them are fugitives. One is a jail case. At least on a showing or representation of the U.S. Attorney here before me they have made inquiries as to the location of the defendant and absent anything further than what I have before me I am going to have to deny your application.

VII.

MR. MacBETH: That is a request to suppress all statements obtained from the defendant on the grounds that they were taken--

THE COURT: You are not offering any statements of the defendant, are you?

MR. MacBETH: There is a possibility that only the single line in the statement given to me would be offered but--

THE COURT: How can you do that? Then you can't try this case.

MR. MacBETH: There was another witness in the room at the time. There is no affidavit here of any showing from the defendant whatsoever that there has been any violation of Fifth or Sixth Amendment rights.

THE COURT: He is entitled to a hearing then.

MR. MacBETH: If he can set forward some basis of what he says happened that would be a violation of those rights and there is no showing of a violation of anything here. It's simply a bold conclusory statement.

MR. GOLDBERG: He says he doesn't remember being apprised of his rights and he didn't want to make a statement and yet he was questioned afterwards.

THE COURT: You are entitled to a hearing on that.

MR. MacBETH: There are certain cases which state that the defendant has to set forth in an affidavit what he remembers to have happened. I think the Government is entitled to that before any hearing. It's impossible for the Government to address the question if we don't know what it is the defendant claims happened.

MR. GOLDBERG: I just stated it from my conversations with the defendant.

MR. MacBETH: We have to have it from the defendant and not a statement from the attorney.

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THE COURT: Mr. Goldberg will get me an affidavit.

MR. GOLDBERG: I will get you an affidavit if that is what you require, Mr. MacBeth.

THE COURT: All right. You can take care of that in a short hearing. You are going to use the statement?

MR. MacBETH: Frankly, I think it depends on whether or not the defendant takes the stand.

THE COURT: There is some question?

MR. GOLDBERG: There is a question of whether or not he will take the stand.

THE COURT: There is some question if he takes the stand as to whether or not any statement or response was unlawfully obtained or can be used. I think he can. It's all over the lot. I had many of them on that and I wouldn't definitively say yes or no on that.

On the retrial he didn't take the stand. I don't know.

MR. GOLDBERG: I will submit an affidavit.

THE COURT: Submit an affidavit and we can rule on that.

Do you have any indication of a prior record of the defendant?

MR. MacBETH: I have turned over the rap sheet.

THE COURT: What is the defendant's prior record?

MR. MacBETH: Expired driver's license and some gambling arrests.

THE COURT: Any convictions?

MR. GOLDBERG: Except for the traffic violation that is his only question. I don't think anything there would preclude his testifying.

THE COURT: That is what I was thinking, trying to be practical about it.

MR. MacBETH: I agree with that.

THE COURT: You better have it then. Get your affidavit and see if that is sufficient to warrant the hearing on it which we can hold before that.

MR. GOLDBERG: I will try to get it in time.

THE COURT: I will take it at the last minute.

MR. GOLDBERG: Thank you.

THE COURT: VII.

MR. GOLDBERG: The problem is if I don't have the names of police officers I can't very well draw up a subpoena.

THE COURT: I know. How soon are you going to get the police officer's name to him? They may take the stand.

MR. MacBETH: I can provide those quickly but

the Government opposes it on the grounds that we do not have to provide them with a witness list.

THE COURT: Get him on the stand and do you want me then to issue a subpoena and wait for it to come back here and hold off the trial while we do that?

MR. GOLDBERG: I would have no objection even if Mr. MacBeth did not want to give me the names for him to subpoena all the records and I won't even know until they come on.

THE COURT: That is one way out.

MR. MacBETH: Does your Honor want all this material subpoenaed?

THE COURT: Otherwise look what happens. We get to the trial and you haven't furnished the name. I don't want them here unless you are going to put the witness on the stand. If a witness is going to go on the stand we ought to have it here.

MR. MacBETH: All right.

MR. GOLDBERG: Is it my understanding Mr. MacBeth will do that?

THE COURT: Is that correct, Mr. MacBeth?

MR. MacBETH: That is correct if your Honor orders it.

THE COURT: I don't have to order it under the

circumstances.

Item IX, there is none.

Item X, adjournment of trial.

MR. GOLDBERG: I didn't hear that.

THE COURT: For the adjournment of the trial.

I don't like to be arbitrary. I guess none of us wants to be arbitrary but whether we are arbitrary is a matter which is objective rather than subjective.

MR. GOLDBERG: I was thinking of Mr. MacBeth's statements and he indicated how simple the case will take to try. I don't see what great harm it would be if he had to try it over again.

THE COURT: There is not that question. It is a problem. A couple of days to a sitting judge is a lot of time.

MR. GOLDBERG: A couple of days to a State judge is no time.

THE COURT: To me it's a lot of time. I have a very heavy calendar and I don't see why we should have the duplication. Another practical aspect of that is the Government tries its case and it puts them in a difficult position on the second time around. If they have a good case it shouldn't make any difference. That is not any consideration of mine really in this case. But the con-

sideration is it's not a multiple defendant case.

MR. GOLDBERG: On a daily basis the case as far as working days since Mr. Payden's arrest it doesn't even come out to 12, 14 working days. I have no objection. I am one of the proponents of speedy trials. Not when I have men sitting in jail to represent them. They have been in a year and a half. I always defer to Federal trials any time they come up but I think in this case I am being put on the spot here.

I have been prepared for a very complex trial before Judge Werker and the Government asked for an adjournment after he already made the motion for dismissal of the case that has gone up to the Court of Appeals and they moved for another adjournment and they granted an adjournment.

THE COURT: That case has folded so it's no problem. I could defer you to November 14th, if that would give you any assistance.

MR. GOLDBERG: I would appreciate that, your Honor.

THE COURT: That is a Friday.

MR. MacBETH: Would it be possible to do it on Wednesday? If the trial goes two days it would produce a conflict for me. Obviously the Government will try the

case at the time your Honor orders.

MR. GOLDBERG: The only reason I ask for that date is that November 12th is a very difficult day for me. I have a number of matters piled up.

THE COURT: What about the 13th, November 13th?

MR. GOLDBERG: If you can set the date that will be the date.

THE COURT: All right.

MR. GOLDBERG: I still oppose the November adjournment, your Honor.

THE COURT: All right. I frankly think if I set you down for November 10th it would have been a sufficient time under the situation as I know it here for you to prepare yourself. In view of your request here and everything else you can fit it in with my schedule and put it on for 10:00 on the 13th of November.

Would you call Mr. Myers as soon as you get back to your office and tell him that it's on for 10:00 a.m. on Thursday, November 13th.

MR. MacBETH: I will do that, your Honor.

THE COURT: I want you to get everything to Mr. Goldberg forthwith that you are required to get.

MR. MacBETH: Can I turn to two matters in this.

THE COURT: Yes.

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MR. MacBETH: First are IB1, the question of whether or not Mr. Payden is a principal or an aider and abettor. It's not necessary that the indictment charge Section 2.

THE COURT: I am aware of that. Are you charging him as a principal or aider and abettor?

MR. MacBETH: In order not to be misleading the problem is that Payden and Vernon and working together in this situation. They may be co-principals, one may be aiding and abetting the other and it isn't possible for the Government to say with precision exactly what their relations were with one another.

So that I think it's proper to say that it's charged in the alternative either as a principal or aider and abettor and it depends on what the facts will show.

THE COURT: Very well.

MR. MacBETH: The last point is the question of subpoenaing the records, the personnel files of the police. I would like an opportunity, if I could, to speak to my superiors in the office and respond on that. The problem is essentially the Brady case goes to material within the custody of the Government and what is happening, the defendant is using the subpoena power of the Court to produce that kind of material.

THE COURT: What he is saying that he wants me to do, and whether I do it or not I don't know and he won't know until you put an officer on the stand, is which records to subpoena because you haven't furnished him with the names of the officers you are going to call.

As I understand it, he is saying he would come to me and say I don't want to cross examine this officer until I see his personnel record, will you issue a subpoena for me and it will take a little time to do that.

MR. GOLDBERG: That is what happens inevitably.

THE COURT: He is saying to forestall the delay that would be encountered in that is to have the records here and he will have them.

MR. GOLDBERG: I am asking that your Honor look at them.

THE COURT: He is only asking that I look at them to see if there is any information in there which he could properly cross examine the witness on with respect to that. That is all he is asking.

MR. MacBETH: Could I ask the order be in the alternative that I either provide tomorrow morning to Mr. Goldberg a list of all the agents--

THE COURT: The ones you expect to call.

MR. GOLDBERG: The ones that he doesn't expect to

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call and those that I will maybe call I couldn't impeach anyway, he will be my witness.

THE COURT: You are satisfied with the alternative proposition, aren't you, Mr. Goldberg, either the names or the records?

MR. GOLDBERG: Yes. Your Honor, if he gives me the names I would need their assignments so I can subpoena the right authority.

MR. MacBETH: I will give those which the Government may call.

THE COURT: All right.

(Conclusion of motion.)

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
vs.	75 Cr. 421
DONALD PAYDEN, a/k/a Country, BILLY VERNON,	
Defendants.	

Before:

HON. LEE P. GAGLIARDI,

District Judge.

New York, November 13, 1975;
11.00 o'clock a. m.

(Room 618)

APPEARANCES:

PAUL J. CURRAN, Esq.,
United States Attorney for the
Southern District of New York;
BY: ANGUS MACBETH, Esq.,
PAUL VIZCARRONDO, Esq.,
Assistant United States Attorneys.

JACK GOLDBERG, Esq.,
Attorney for defendant Donald Payden.

SIDNEY MEYERS, Esq.,
Attorney for Billy Vernon.

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MR. GOLDBERG: Your Honor, Jack Goldberg for the defendant Donald Payden.

I understand Mr. Macbeth at this time wants to reargue a portion of your Honor's ruling in connection with the original motion I had made which I believe you heard last week.

I wish to state the first opportunity I had to look at his moving papers was this morning and that yesterday I found myself in Westchester County, in the County Court and the papers were sent to my office or delivered, but I didn't get to my office and I didn't get an opportunity to look at them only until this morning.

MR. BACBETH: I served the papers in your Honor's chambers last Thursday. I called Mr. Goldberg's office and asked him to call me three our four times on Thursday and on Friday so that we could arrange a time to come before your Honor and settle this row before the trial began.

I received a call from Mr. Goldberg late on Friday. He told me at that time he would be in the Court House on other matters Monday morning and would try to find time to come before your Honor then and I was going to mail the papers to him and he suggested I not do that, he will be in the Court House Monday and he would

pick them up.

I held them for Monday and when he had not arrived at my office, I mailed them either Monday evening or Tuesday morning, but we were in a situation where the papers were prepared and I was making every effort I could not only to bring this matter on before your Honor as quickly as possible, but also to put the papers in Mr. Goldberg's hands. The only reason I did not send them immediately on Thursday is that I hoped we would be able to have a hearing very quickly on the matter.

The papers amount to approximately six or seven pages. It is a straightforward point, and I hoped Mr. Goldberg would have a chance to read them prior to the argument on Thursday or Friday, but had he asked me to send them or agreed to my suggestion to send them on Friday he would have had them Monday morning.

THE COURT: What is the difficulty?

MR. MACBETH: The question is, your Honor instructed us ten days ago either to give a witness list to Mr. Goldberg or to subpoena the personnel files and the medical files of the witnesses at trial, the New York City policemen and produce the same material from the Drug Enforcement Administration and I told your Honor at that time I wanted to check on the position which our office

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took on that request and our position is that we are not under an obligation to provide the witness list and that the subpoena is improper under Rule 17 of the Federal Rules of Civil Procedure, particularly under the Nixon case. The material asked for is not evidentiary and it is most clearly a fishing expedition.

He asked for everything and in response to a request from your Honor's clerk, I did in fact serve a subpoena yesterday on the Police Department asking for the personnel records and the medical records of those witnesses. They would not voluntarily release that material to me. In fact, I have never seen it. There is an attorney from the Police Department here this morning in response to that subpoena and there is also an attorney from the Drug Enforcement Administration in Washington who also takes the same position that the United States Attorney does in this District that that material should not be released to the defendant pursuant to a subpoena under Rule 17.

THE COURT: I think you are refreshing my recollection as to what the law is. It is accurate. The Nixon case and the Ayosi case does not require the production of these documents without a further showing than what has been shown here and I will amend my decision

in that respect, not to require the production of those records.

MR. GOLDBERG: I except to that ruling.

THE COURT: Very well.

MR. GOLDBERG: I also except to not being given the opportunity of researching this point myself. It wouldn't take very long.

MR. MACBETH: I informed Mr. Goldberg --

THE COURT: I don't need any further argument. What else do we have?

MR. MACBETH: I think there are two other matters which should be taken up prior to selecting the jury. The first is an issue that Mr. Meyers raised with your Honor in chambers at the time we were discussing the possibility of Mr. Vernon going to Detroit and that is that he felt one more count of the indictment which named Mr. Vernon should be tried at this trial, and the Government is willing to do that, but I think that should be a matter of record since the Government took the position it would ask to have that count severed when we were before your Honor in late October, and that would be Count 6 of the indictment.

The Government is prepared to try Count 6 as well as Counts 1, 2 and 3.

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THE COURT: And you move to sever all the other counts?

MR. MACBETH: Yes.

THE COURT: Motion granted.

MR. MACBETH: One final matter --

THE COURT: How many of the overt acts are involved?

MR. MACBETH: Overt Acts 1 through 7 and Overt Act 13 and 14.

THE COURT: I assume you will have a clean indictment for me?

MR. MACBETH: I will have a redacted indictment for your Honor.

One further matter is, in interviewing a witness yesterday, it became apparent that he could testify to one further attempted sale of narcotics on October 23, 1974 that involves these two defendants. The fact that there was evidence as to that sale was not in the reports we received. The Government would move to present that testimony as well. The reason I bring that up, ten days ago before your Honor we said the conspiracy ran to August, September, 1974 and this would be an event which took place in and around October.

MR. GOLDBERG: Your Honor, did I understand

Mr. Macbeth to indicate that he now wants to bring in a sale that transpired --

MR. MACBETH: An attempted sale.

MR. GOLDBERG: With regard to my client?

MR. MACBETH: It involves yout client.

MR. GOLDBERG: I oppose it. I oppose it moreover on the grounds that I was conditioned to this conspiracy being terminated in September, as Mr. Macbeth stated last week. Now we are getting to acts which have taken me by surprise, which appear in no place on this indictment. Now he is going to bring this into the case and I oppose that, your Honor, especially at this late date.

MR. MEYERS: Do I understand that this sale was to have taken place and involved only Mr. Payden?

MR. MACBETH: It involves Mr. Vernon too.

MR. MEYERS: Then I oppose it.

THE COURT: They say they are being surprised by the fact you are presenting another act that occurred beyond the period which you had indicated before.

MR. MACBETH: I recognize that. That is precisely why I wish to bring it up now.

THE COURT: Is it vital to your case or not?

MR. MACBETH: I think it is important.

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THE COURT: I know you think every scrap of testimony is important. On the other hand, it is a matter that is coming up at the last minute and Mr. Goldberg has already vigorously opposed the sudden trial in this case which I don't think is that sudden, but he has made that contention.

I would be inclined unless it is vital to your case not to permit it.

MR. MACBETH: I think it shows clearly the relationship between the two defendants and that it was an ongoing one.

THE COURT: Is it cumultative or isn't it?

MR. MACBETH: It is a similar --

THE COURT: Is it cumulative?

MR. MACBETH: There are certain conversations that add to what is included in the other sales, but it is another sale of cocaine, attempted sale.

THE COURT: Are you prepared to give them in advance the information with respect to that?

MR. MACBETH: Yes. All I have are notes I took yesterday from speaking to the witness and I will present them to the defendants immediately. I have those now.

THE COURT: Is it a witness who is involved in

the other two transactions?

MR. MACBETH: Yes.

THE COURT: Let me see the notes.

Why don't you tell us what it is all about.

MR. MACBETH: This is an event on October 23 in which the undercover police officer who dealt with Vernon and Payden on the first two transactions went back and was taken by Vernon to a place where he said he wanted to go back to Country, the alias for defendant Payden, and he said he couldn't beat the good stuff he was getting there. Vernon said he was trying to get in touch with the Cubans which was another possible connection but the Cubans didn t want to meet anyone and that the undercover would have to give the money directly to Vernon. They then went up to 145th Street where of course the previous transactions took place. Vernon went in and out of the club there and came back saying he could buy an eighth of a kilo from Country, but that the undercover would have to front the money, which for that amount, would be $3800 and that it was the same quality which would take a 1/2 cut.

The undercover said the money was not all his, and that he would deal only with Country if Country would come out and guarantee the sale and Vernon said Country

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was not going to meet him, that he, Vernon, had to buy $50,000 worth of narcotics from Country before he could deal with him on a hand-to-hand basis and that the undercover would have had a better chance of dealing hand-to-hand with Country, but on the second occasion, he was found to have a gun on him and words to the effect that that had blown it as far as the undercover was concerned, and finally the transaction closed with the undercover saying he would get back to Vernon on the matter.

The conversation clearly shows the length of dealings that had gone on between Vernon, Payden --

THE COURT: I will permit it.

MR. GOLDBERG: Exception. I ask for a continuance until tomorrow on the basis of that offer made by the Government.

MR. MACBETH: The Government opposes any further continuance, your Honor.

MR. GOLDBERG: Your Honor, I have already stated my reasons for an adjournment of this matter. I have been against my will forced to come in at this early date, not that I am opposed to trying cases, but now not even on the eve of trial, it is the morning of trial, I am suddenly faced with new accusations made against the defendant which appear nowhere on the face of this indictment.

As a matter of fact, the overt acts, the last overt act that is spelled out in this indictment is October 9, 1974 and I believe that corresponds with the substantive counts as well even with regard to the other defendants that have been severed.

Now I am told that an incident took place on October 23, and this despite the fact that Mr. Macbeth has indicated orally that the conspiracy itself ended, I believe, in September in so far as my client is concerned, now we are going into two months after that and I am suddenly forced into this position again on the eve of trial.

I would like the opportunity both in light of this and in light of the affidavit proffered to me this morning which I can safely say I have spoken to Mr. Macbeth about this affidavit on an earlier day. I couldn't get to the court until Tuesday. I was here Saturday but he wasn't here. I would like until tomorrow since this new evidence has been proffered to the Court.

MR. MACBETH: Your Honor, of course this is an act in furtherance of the conspiracy. There is no obligation of the Government to put in every possible overt act into an indictment. The indictment went to the period of April 28. It was only in the very hurried

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circumstances of our hearing on Mr. Goldberg's motion ten days ago that the Government made any representation as to the period of the conspiracy as to his client.

THE COURT: I can't see an prejudice.

MR. GOLDBERG: Your Honor, this is a separate crime.

THE COURT: It is part of the conspiracy.

MR. MACBETH: This is not a new count of the indictment.

MR. MEYERS: Your Honor, you recall when the motions were made by the Government for severance, a memorandum of law was submitted by Mr. Macbeth and in the memorandum he specifically indicated that Counts 4, 5 and 7 had no relevancy at all to the conspiracy. We assumed that the conspiracy had ended prior to Counts No. 4, 5 and 7.

On page 2 of his memorandum of law he makes that admission, that the Bell case, Count 6 involving my client and the Bells, had nothing whatsoever to do with the conspiracy.

MR. MACBETH: This has nothing to do with the Bells. The point of that memorandum for the severance was that we did not contend that the transactions between Payden and Vernon and the transaction between Vernon and

the Bells were all one conspiracy and the transaction October 23 has nothing to do with the Bells.

THE COURT: I will permit it.

MR. GOLDBERG: Exception.

THE COURT: We don't require, Mr. Goldberg, in this court that on every adverse ruling you take an exception. The only time at which an exception is really required here is upon the denial of a motion to dismiss the indictment at the conclusion of the Government's case and at the conclusion of the defendant's case, so I don't believe we ought to be going around saying "Exception" after every ruling that is adverse.

Are we ready to proceed?

MR. GOLDBERG: There are a couple of further matters.

I was informed this morning by Mr. Macbeth that indeed a photograph was used by the surveillance team on the days of the overt acts. As part of my original motion, I asked for all photographs that were used in connection with this case and at that time I was informed that none existed. Now it is apparent there were photographs used, or at least one photograph of defendant Payden.

MR. MACBETH: I never informed Mr. Goldberg

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that no photographs were used. I sent him a letter last week setting out the circumstances of the arrest. I told him at that time I was inquiring as to what happened, whether there had been any lineup, show up, photographic spreads. There had been no lineups, no show ups, no photographic spreads. What happened, and what I told Mr. Goldberg this morning, following the first transaction, the undercover agent went back to his group in the Task Force. He had heard discussion there with other people about someone named Country. He asked to see a photograph of Country. He was shown it. It was clearly a photograph of the man he had seen. At the next transaction, he showed that photograph to the surveillance officers so they would know who to look for. It was not a suggestive spread.

THE COURT: All you want is a copy of the photo?

MR. GOLDBERG: Yes.

I further made a motion the other day we be given an opportunity of a hearing to suppress any evidence the Government intends to offer and on the day we spoke about that portion of the motion, your Honor indicated that an affidavit from the defendant with regard to his understanding what went on the day of his arrest, and I sub-

mitted that affidavit to the Court, and I think at this time I am entitled to know whether or not the Government intends to offer any statements made by Mr Payden.

MR. MACBETH: The Government intends to offer the single statement that Mr. Payden made.

If a suppression hearing is held, the one witness will be the police officer involved at the time. He is not available at the moment because he made an arrest last night and is having the prisoner arraigned.

I would not offer that this morning and the hearing could take five minutes at lunch or at the end of the day.

TEH COURT: You don't have any objection to that, do you, Mr. Goldberg?

MR. GOLDBERG: No.

Do I understand, your Honor, that Mr. MacBeth is not going to afford me a witness list?

THE COURT: That is what he has indicated.

MR. GOLDBERG: Is that the ruling, he is not required to give it to me?

THE COURT: He is not required to give you the list.

MR. GOLDBERG: I would, however, like to subpoena the two arresting officers in this case, and

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with Magnum --

THE COURT: You don't have to tell me their names.

MR. GOLDBERG: I have their names but I don't know where they are assigned, where I could deliver the subpoenas to. He is not calling them, he indicated as much in his letter.

THE COURT: If you ask for a subpoena, the Clerk will issue one for you. I don't know where they are, either.

MR. MACBETH: I think the Government can produce the officers. I will have to obviously call them.

THE COURT: You call them and see if you can produce them so we won 't have to serve a subpoena, all right?

MR. MACBETH: I will.

THE COURT: If you are both ready, I can call the jury'

MR. MACBETH: Government ready.

MR. MEYERS: Defendant Vernon ready.

MR. GOLDBERG: Your Honor, I continue my objection.

THE COURT: Yes.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, :

Plaintiff, :

V. : 75 CR. 421

DONALD PAYDEN, a/k/a COUNTRY, and BILLY VERNON, :

Defendants. :

---x

November 13, 1975
2:40 p.m.

BEFORE:

HON. LEE P. GAGLIARDI,

District Judge

A P P E A R A N C E S:

ANGUS MacBETH, ESQ.,
PAUL VIZCARRONDO, ESQ.,
Assistant United States Attorneys

JACK GOLDBERG, ESQ.
Attorney for defendant Payden

SIDNEY MYERS, ESQ.
Attorney for defendant Vernon

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(A jury and two alternates were duly impaneled and sworn.)

THE COURT: Mr. MacBeth.

MR. MacBETH: Thank you, your Honor.

May it please the Court, Mr. Goldberg, Mr. Myers, ladies and gentlemen of the jury. This is an important case. It is a case about a partnership. But it is not an ordinary partnership. It is a partnership in dealing in narcotics. A partnership in selling of cocaine.

Donald Payden, the defendant sitting at the end of the table there, is the supplier of the cocaine. Billy Vernon, the other defendant sitting here, is the man who worked with Donald Payden, bringing him customers and delivering the cocaine.

MR. GOLDBERG: Objection, your Honor.

THE COURT: Overruled.

MR. MacBETH: That is the case that I will now outline to you. My name is Angus MacBeth, I am an Assistant United States Attorney, and it is my privilege to present the case for the United States and present the evidence for the Government.

Sitting with me at counsel table, also representing the Government, is Paul Vizcarrondo.

Judge Gagliardi has told you that this is a

case. You have been selected and sworn as jurors in this case, and it will be your responsibility to decide the facts in this case. This is an important duty and responsibility. It is important for the defendants here, Donald Payden and Billy Vernon. It is important to the Government, which has the job of protecting the people of this country from narcotics and dealers in narcotics. And that is what we are dealing with in this case, narcotics traffic.

Each of the defendants is charged with selling cocaine and joining with others in sale of cocaine in violation of law against dealing in drugs. The case is a simple one. It's simple because the defendants made their sales of cocaine to a member of the New York City Police Department who was working as an undercover agent.

You will see the policeman on the stand and you will hear directly from him how the introductions were made to Billy Vernon and how Vernon arranged purchases of cocaine through his connection Country, which is the name Donald Payden goes under.

On August 6, 1974 the police officer met Billy Vernon in Harlem. Billy asked if he was interested in buying cocaine. The officer made it appear that he wanted good quality cocaine. Billy took him to a connection,

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the source for that cocaine, and this was Country, the defendant Donald Payden.

Payden was a schrewd operator. He didn't deal with just anybody on the street, and he didn't keep a supply of cocaine on him that could get him into any kind of trouble. He dealt with people he knew and trusted; the people he could rely on in his drug dealings.

Billy Vernon was one of those people. For that reason, the police officer couldn't talk to Country directly. Billy acted as a go-between, the man who made the deals.

On August 6, 1974, the police officer sat in his car while Vernon talked to Country in the street, and he came back to the police officer with the price for the cocaine and he went back to Country.

Then Vernon came back and went into a club to get the cocaine from one of Country's men inside the club. And at that time Country stopped and took a long look at the police officer before he followed Billy into the club.

A few minutes later Billy Vernon came out of the club and gave the officer the cocaine.

Three weeks later, on August 27, 1974, the officer met Billy again. Essentially, the same sort of deal was made.

Billy looked for some other connections and

couldn't find them in their usual hangouts, so he took the officer back to Country. Again, Country was very cautious. He wouldn't talk to anyone except Billy. He wouldn't deal in broad daylight. He had to go somewhere else to collect the cocaine and he didn't come back with the police officer--to the police officer with the cocaine. He sent Billy back.

During that transaction at one point all three people, Country, Billy, and the police officer went into a bar, to a club. And even there Country was very cautious and would only talk to Billy.

The evidence will show that despite all this caution, the cocaine was passed. Other narcotics agents were watching the dealings on the street, they saw money change hands and they saw Country drive off with Billy to get the cocaine. Billy vouched for the cocaine. He said that Country had the best coke around, and, putting punch behind his words, he offered to take the coke back if the officer wasn't satisfied with the quality of the merchandise.

Ask yourselves if this isn't evidence that shows that Country was indeed a shrewd dealer. Wasn't he careful about his customers? Wasn't he careful about his product? Wasn't Billy's pride in introducing the officer

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to Country's stuff justified?

Later, in October of 1974, Billy made another cocaine deal with the same policeman, but with another connection, David and Lester Bell. Just as he did with Country, David arranged with the policeman to get the cocaine from Country. The Bell brothers brought the cocaine to their apartment where they met Billy and the police officer and money was exchanged for cocaine.

Still later, on October 23rd, the police officer tried to make another larger purchase of cocaine directly from Country. But this failed. Country would not deal hand to hand with someone he did not know very well indeed.

Billy Vernon told the police officer that he'd have to do $50,000 worth of business with Country before he would deal with him hand to hand.

Throughout these dealings Billy Vernon worked on a level with the police officer. On August 6th, the first occasion, he took the police officer, Chris Jackson, to another place in Harlem; he was taking him to another place in Harlem when he saw Country on the street and suggested when he saw him there, that they get the cocaine from Country.

On the second occasion, he tried a couple of other connections before going back to Country. And that

entire deal took more than three hours to complete, and during it, Vernon took only part of the payment for the cocaine as a down payment, before delivery.

This isn't the way someone acts who is trying to set up a seller or rip off his buyer.

The first meeting with Country was accidental. If Vernon was trying to create the impression that he was going to Country, when really his supply was somewhere else, he would have suggested a visit to Country to begin with. That isn't the way it happened. It happened that he was going somewhere else, he saw Country on the street, and he suggested they stop and get the cocaine from Country, because he knew what kind of a product Country had.

If he was aiming to rip off the police officer, his buyer, he would have demanded more than the $400 as a down payment.

MR. GOLDBERG: Objection, your Honor.

THE COURT: That is an outline of what they expect to prove.

MR. MacBETH: He would have demanded more than the $400 as a down payment because the cocaine that was being bought was worth more than $1,000 and he would have just walked off with the money at the end of it, instead of coming back to the police officer with the goods on

which the down payment had been made.

The evidence shows that Vernon was dealing on the level. He took a long time to complete the transactions, because Country was cautious in his dealings and Vernon took the undercover agent to Country for the cocaine, because what Vernon said to him was true: Country had the best cocaine for the price that could be found.

The defendants were dealing in cocaine. Billy Vernon was setting up deals in August and September and October of 1974. And Country and the Bell brothers supplying drugs. Billy took a fee for his work. Both of the defendants, Donald Payden and Billy Vernon, were engaged in illegal trading in narcotics.

Pay close attention to the evidence as it comes in to you, because it comes in in bits and pieces, like a jigsaw puzzle, from many different witnesses.

B2 Weigh the testimony in your common sense. At the end of the trial, I am confident that you find the Government has proved beyond a reasonable doubt the charges that have been brought against these defendants. But most importantly, remember your oath as jurors: To try this case fairly and impartially.

That is what the Government wants from you. I'm sure that is what the defendants want from you as well.

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Each of us in this courtroom, the Judge, the prosecution, and the defense attorneys, and the jury has an important job to do. As Judge Gagliardi will tell you again, you are to judge the facts in this case. All of us rely on you to do that fairly and impartially, solely on the evidence that is presented in this Court.

If you fully and conscientiously fulfill your oath as jurors, each of us will be fully satisfied with your verdicts. I'm sure that we will find that you have rendered that full and impartial justice that Judge Gagliardi talked about earlier this morning.

Thank you very much.

MR. MYERS: Judge Gagliardi, Mr. MacBeth, his assistant, and Mr. Goldberg. Ladies and gentlemen of the jury. You have just heard Mr. MacBeth, and I want to make something very clear to you. What Mr. MacBeth recited to you is not evidence in this case. It is what he must at this particular point indicate to you as to what he expects to prove. It is not a summation. It is merely, the purpose of the opening is to indicate both by the prosecution and the defendant what they expect to establish. So that the statements made by Mr. MacBeth are not to be taken as evidence in this particular case.

What do we mean by the burden of proof? The

burden of proof in th ase is created initially by what Judge Gagliardi very succintly stated, the indictment is merely is a complaint. That is, it differs radically from an action that may be a civil action, where you serve a summons and the defendant answers.

The indictment is a means or a mechanism whereby the Government institutes a criminal complaint. And it is not to be taken as gospel, that the elements in the indictment are true.

There is a burden that rests on the prosecution, and that burden remains with the Government every moment of this particular trial up to and including the point where you come back with your particular verdict.

As far as my defendant is concerned, certainly as far as the other defendant--I represent, by the way, Mr. Vernon, and he alone--they are not required under our law to take the stand. You are not permitted to draw any inference either of guilt or innocence by virture of the fact that they did not take the stand. That is their constitutional privilege. In effect they are saying, look, you, the Government, you instituted this complaint; prove it. And you must go further, and you must prove it "beyond a reasonable doubt."

What do we mean by beyond a reasonable doubt?

Well, at the appropriate time, if it becomes essential in this case, his Honor will instruct you as to what the terminology beyond a reasonable doubt means. And of course, you must follow his instructions as you must follow all the instructions that his Honor may give you.

But as far as the defendant is concerned, he can remain mute. As I say, I don't want to be boring on the subject, the Government must produce and establish each and every element of the crimes alleged in this particular indictment "beyond a reasonable doubt."

Mr. MacBeth has referred to the fact that one of the counts involved a conspiracy. A conspiracy can be referred to as a partnership, it is true. There has to be a meeting of the minds. It is a partnership not in the civil sense that one will sit down, certainly if there were to be a partnership in such a case as this is involved, the parties would not sit down and write out a formal partnership.

But, nevertheless, it is incumbent upon the Government to establish beyond a reasonable doubt that a partnership existed between my client, Mr. Vernon, and Mr. Payden.

Now, there are what we call certain substantive counts that are involved here. And even in those particular

cases the burden is on the Government to establish beyond a reasonable doubt the guilt of the defendants on each aspect which is involved on the questions of law which will be explained to you by his Honor.

I feel certain that by the time this case is concluded, that you will find that the Government has failed to sustain the burden of proof requisite in a case of this kind and that you will find a verdict for the defendant Mr. Billy Vernon.

THE COURT: Mr. Goldberg.

MR. GOLDBERG: Mr. MacBeth, Mr. Myers, your Honor, ladies and gentlemen of the jury. Mr. MacBeth said two things in his opening statement a little while ago. He talked about the type of case or the case that he was going to attempt to prove to you. He characterized the case as being, in two words: Important and siple.

He was careful in saying this case has importance to the Government, and he was also careful to state that this case has importance to the defendants.

Who are the defendants in this case? They are seated before you; they are named in an indictment.

Mr. Myers a moment ago talked to you with regard to an indictment. I didn't have the opportunity to speak to you when you were selected, but I caution you,

that an indictment is only an accusation. That is the only way a man can be brought to trial.

Mr. Vernon and Mr. Payden have pled to that indictment. They have pled not guilty. We wouldn't be here were it not for that fact.

The charges are serious--

THE COURT: Excuse me, Mr. Goldberg. Would you please stand at the lectern.

MR. GOLDBERG: There are four charges, and Mr. MacBeth has indicated to you in his opening statement that he was going to prove to you that yes, there was a conspiracy; yes, there was a partnership, which in effect amounted to conspiratorial conduct.

Mr. Myers stated, that is fine, Mr. MacBeth that is fine, Mr. Prosecutor. What you say you are going to prove and what you will prove are two different things.

I say the same thing to Mr. MacBeth on behalf of Mr. Payden. You will see when Mr. MacBeth went into his opening remarks he went back and forth between Mr. Vernon and Mr. Payden. He said Mr. Vernon did this and Mr. Payden did that. I ask you to listen to the evidence in this case. That is the only testimony, the only evidence that you are even allowed to consider, the only facts that you can consider. You make the decision as to the facts. You

make the decision from listening to the witnesses on that stand whether or not there is evidence, there are facts, and, most importantly, whether there is evidence, if you believe it, to convince you beyond a reasonable doubt that Donald Payden conspired or got himself involved in this partnership to sell narcotics.

Ask yourselves this during the course of this trial: Did Mr. Payden ever touch any narcotics that Mr. MacBeth is going to put out on this witness stand or have a chemist testify about? Ask yourselves this question. Ask yourselves this question, more importantly: At any time, at any time during this alleged conspiracy, whether it begins in August or July, or whatever time it began and whatever time it ended, at any time did Donald Payden ever have any conversation with any police officer, any Government agent, any informer with regard to his producing, getting, obtaining, seeking, buying, selling, mixing, or anything to do with narcotics?

You listen for that testimony. You won't find it. You won't find a scintilla of evidence that will convict Donald Payden of the crime for which he is charged. And I ask you to consider the evidence, to sit back and be patient. I ask you to be patient with me during my cross examination and during the entire testimony.

But most important of all, I ask you to listen to that testimony. Listen to it carefully. Weigh it, and you make the decision--you, yourselves.

I'm sure when that decision ultimately has to be made, I know you will make a decision that is consistent, that is fair, and that is impartial. And you won't be swayed by speculation and surmise, because that is not evidence in this case. I'm sure after you have considered the evidence you will render a verdict that is fair in this case, a verdict of innocence, acquittal.

Thank you.

THE COURT: First witness.

(Continued on page 16.)

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MR. MacBETH: The Government calls Chris Jackson.

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C H R I S J A C K S O N, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

THE COURT: Mr. Jackson, you are talking softly. It is necessary we all hear you. Shout out so we don't have to keep on saying, "What did you say?" And that way we won't have these interruptions and we will be able to hear you clearly, all right?

THE WITNESS: Yes.

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DIRECT EXAMINATION

BY MR. MacBETH:

Q Mr. Jackson, how are you employed?

A By the New York City Police Department.

Q What is your position with the New York City Police Department?

A Police officer.

Q How long have you been with the New York City Police Department?

A Six and a half years.

MR. MYERS: It is very difficult to hear back here.

THE COURT: Shout it out, please.

Q Turning your attention now to August 6, 1974,

were you on duty on the evening of that day?

A Yes, I was.

Q Will you tell the Judge and jury what happened in the course of that evening?

A I met with troop 9 surveillance officers at 114th Street and Morningside. Plans were formulated for the possible purchase of narcotics from Billy Vernon. Also was present was a confidential informant.

At this time I proceeded to 116th Street and Lenox Avenue. I was driving a 1971 Cadillac. I parked my vehicle in front of Jimmy McDaniels' bar. I got out with the confidential informant. We walked across 116th Street and met with Billy Vernon.

Q Do you see Mr. Vernon in the courtroom today?

A Yes.

Q Would you point him out?

MR. MYERS: Identification is conceded.

THE COURT: All right.

A I was introduced to Billy Vernon by the confidential informant.

Q What did Vernon say to you and what did you say to Vernon?

A The confidential informant said Billy, this is my man Troy--

MR. GOLDBERG: Objection.

THE COURT: Sustained.

Q Tell you what you said to Mr. Vernon and what Mr. Vernon said to you.

A Billy said hi. I said how are you doing.

At this point Billy asked me what was I interested in. I told him I was interested in purchasing one ounce of cocaine at a good quality. He stated he had an ounce and a half of cocaine in his apartment, that it couldn't take a cut. It was for the street.

Q Could you describe to the jury what you mean by a cut?

A By cutting narcotics, is diluting it in strength and you can make more. For instance, if you had an ounce of cocaine, if you put one cut on it, you would have two ounces of cocaine with half the strength.

Q Would you continue the conversation you had with Mr. Vernon?

A Vernon stated to me that he can get me an ounce of cocaine from his connection but it would take approximately a half hour for me to receive the package. He told me he had to go uptown to get it. I offered Vernon a ride to his connection. He accepted. Vernon stated we were going to the vicinity of 150th Street and Broadway.

Q Did he tell you who his connection was?

A Not at this time, no, he did not.

I proceeded on Lenox Avenue to 145th Street, proceeding across town. Approximately 145th Street between Edgecomb and St. Nicholas Avenue, Vernon stated that we just passed Country, that Country had the best cocaine around, would I be interested in buying some of Country's cocaine. I told him only if it was good. I was familiar with the person known to me as Country a few months before I met with Vernon.

At 145th and Broadway I made a U-turn under the direction of Billy Vernon and we proceeded back to 356-1/2 West 145th Street and I parked the vehicle at this location. Vernon stated he was going across the street to talk to Country. There were approximately five or six males opposite 356-1/2. I asked Vernon who was Country and he pointed and said it is the fat guy across the street.

Q Could you see in the courtroom today the person that Vernon pointed out to you as Country?

A Yes.

Q Would you indicate to the jury who that is?

A The man sitting at the table with the beard.

MR. MacBETH: May the record reflect that the witness has identified Mr. Payden.

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THE COURT: Is that conceded?

MR. GOLDBERG: Yes.

Q How far were you aware from Mr. Payden when you parked the car?

A Across the street. Two lanes, a two-lane street.

He left the car and went over. I observed him go directly to this person he called Country, engaged him in a brief conversation. He returned to the vehicle and stated that Country didn't have any cocaine but one of Country's lieutenants or his man had cocaine. I asked him how was the cocaine; he said it was still Country's man's cocaine and the cocaine was of good quality. I asked him how much was the cocaine. He told me it was $800 an ounce. I told him I would buy the ounce from him.

He went back across the street directly to Country. He engaged him in a brief conversation. He returned to the vehicle. He stated to me that he has to go into the club at 356-1/2 West 145th Street to get the ounce. He then asked me for the money. I counted out $800 and handed the money to Vernon. Vernon left the car and went inside the club. About a minute passed, Country came over and stood in front of the club. He looked in my direction. He was there for about a minute or two, then he entered the club--

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MR. GOLDBERG: Objection. I ask that be stricken, looked in my direction.

THE COURT: What did you observe about his head?

THE WITNESS: Excuse me?

THE COURT: You said you observed Country. What did you observe him to do?

THE WITNESS: Looked in my direction. He looked directly at me.

Q Continue.

A He stayed in front of the club for approximately a minute and he entered the club. Approximately ten minutes later, Billy Vernon came outside the club and entered the car and handed me two tinfoil packages containing white powder. He asked me to check it out. If I didn't like the cocaine, he would bring it back into the club and get me my money back. I told him that I didn't want to check it out in front of the club because I had a pistol on me and I will check it out somewhere else.

I then drove to 140th Street and Eighth Avenue at which time I parked the car, examined the cocaine. The confidential informant left the car to enter a store. I looked at and examined the cocaine. I told Billy I was satisfied.

By this time the confidential informant came

back. I drove Billy back to 116th Street and Lenox Avenue, at which time he exited the vehicle. I returned to 114th Street and Morningside Drive at which time I informed the surveillance officers I made a purchase of narcotics from Billy Vernon.

The narcotics was then sealed--

MR. MacBETH: Could we have this marked as Government's Exhibit 1.

MR. GOLDBERG: I will object--withdrawn.

(Government's Exhibit 1 marked for identification.)

XXX

Q Mr. Jackson, I show you what has been marked Government's Exhibit 1 for identification. Can you tell the jury what that is? Have you seen it before?

A Yes. This is the two packages I received from Billy Vernon on August 6, 1974.

Q How can you identify that as the two packages you received at that time?

A My name is on the envelope, police officer Vance Herlihy, the case number, the date.

Q Is that your signature?

A That is my signature.

Q When did you sign it?

A When I returned to the office. I placed the

narcotics in the plastic bag, sealed it and dropped it in the safe. The next day it was then taken from the safe and brought to the regional laboratory.

Q And you signed it at what time?

A I signed this approximately 11:30 at the office on August 6, 1974.

(Continued on page 24.)

Q Turning your attention now to August 27, 1974. Were you on duty on the evening of that day?

A Yes, I was.

Q Would you tell the Judge and jury what happened in the course of that evening?

A I met with Group 9 surveillance officers at 114th Street and Morningside Drive. Plans were formulated for the possible purchase, another purchase from Billy Vernon. About 5:50 p.m., I proceeded in a 1971 Cadillac to 116th Street and Lenox Avenue. There I met with Billy Vernon and told Billy that I was interested in purchasing some two ounces from him, two ounces of cocaine fr[illegible] him.

He asked me did I want to go back to the country or did I want to go to his Cuban connection. I told him I would like to try some of the Cuban cocaine. We entered my vehicle, we proceeded to 148th Street and Broadway at which time Vernon exited the vehicle.

He went into the Oasis Bar. He stayed in there approximately a minute and returned and stated to me that his connection wasn't in the bar.

We then proceeded to 150th Street and Broadway at which time Vernon exited the vehicle again and entered the Gallery Bar. He stayed in there approximately a minute

and returned to the vehicle. He stated that he couldn't find his connection in there, either.

Vernon then asked me did I want to buy the cocaine from Country. I told him yes, and we proceeded to 145th Street, 356-1/2 145th Street. I pulled in front of the club. I observed Country standing in front of the club. Vernon exited the car and went over and spoke to Country. Country and Vernon entered the club.

Approximately 20 minutes later, Vernon exited the club and met back with me in the car.

Q Will you tell the jury, what kind of a car you were driving at this time?

THE COURT: He did. He said a 1971 Cadillac.

A He came back into the car and told me that Country had the two ounces of cocaine but Country didn't want to do any business until it got a little darker.

He also told me to come into the club.

Before Billy Vernon got out of the car, he told me to leave my pistol in the car. I ignored the fact he told me this. I entered the club. There was Vernon, a yellow metal gate, a locked gate. There was a man that opened the gate and let us in in the vestibule of the club. The gate was then locked. The man then searched Vernon, he searched me. He searched me a few times, he didn't find

my gun on me and finally -- I had my gun in front of me and I had a big buckle. He hit me underneath my buckle and he felt something like metal. From there I told him that I had a gun.

He told me I would not be admitted to the club with the gun. I observed a camera in the little vestibule that monitors anyone coming into the club. I left the club. I drove around the block and informed the field team I was putting my gun in the trunk of the car. I returned to the club. Again I was searched.

The doorman told me --

MR. GOLDBERG: Objection.

THE COURT: Sustained.

THE COURT: You had a conversation with the doorman?

THE WITNESS: Yes.

Q What happened?

A He then unlocked another door, actually to the club. I was then admitted to the club. I observed Vernon sitting down, I went over by him. Also I observed approximately 15 people gambling in the club. They all had large sums of money in their hands. There was a bar in the club, approximately five or six people at the bar drinking.

I went over and bought a drink from the bar. I

asked Billy what was the holdup. He stated to me that Country didn't want to do any business because it is too light outside and that Country did have the two ounces. As soon as it gets a little darker we can do the deal.

Approximately 20 minutes later I heard a voice from Donald Payden saying Billy, come on, we are going to do the deal.

I exited the club with Billy Vernon, Country. I nodded to Country, Country nodded back and just said hello. We exited the club. Vernon and Country walked approximately ten feet in front of me engaged in a brief conversation.

Vernon returned to where I was standing. I then walked east approximately ten feet. Vernon stated that him and Country was going to get the cocaine and for me to give him $400 because he knew I didn't want to front $1,600 for two ounces of cocaine.

He said to give him $400 and he will make up the difference and you meet me down at 116th Street and Lenox Avenue by the housing and I will give you the two ounces and you will give me the remainder of the money for the cocaine.

I handed Billy Vernon $400. I observed him

meet with Country again. I observed them both entering a 1973 two-door grey Mercedes Benz.

Q Would you describe the manner in which you gave the money to Billy Vernon?

A Yes. I counted out $400 in the street. I handed the money to Vernon. Vernon counted the money and placed the money in his pocket.

He then met with Donald Payden and both of them entered a grey Mercedes Benz. Donald Payden was driving this vehicle. I observed them pull out. I entered my vehicle and I met with the field team and informed them that I gave Billy Vernon $400 and that Country and Vernon was going to get the two ounces.

I told them that Vernon told me to meet them down at 116th Street at Jim McDaniels Bar in approximately an hour. I proceeded down to 116th Street and Lenox Avenue at which time I parked the vehicle and entered the bar.

Approximately an hour and 15 minutes, an hour and a half later, Vernon came in the bar, motioned me to go to come with him into the men's room.

I entered the men's room with Vernon. Vernon removed a clear plastic bag that contained a white powder from his waistband. He opened the bag up. He snorted

a little bit of the cocaine. He asked me did I want some and I said no, I will check it out later.

He then removed the dollar bill from his pocket and placed a small amount of the cocaine into the dollar bill. He stated he wanted a taste for later.

I asked Vernon how much was the cocaine and he told me the total price is $1,600. I counted out $1,250 and I gave $1,250 to Vernon.

Vernon counted the money and placed the money in his pocket. I gave him an extra $50 for like an appreciation for getting the cocaine from the defendant.

I left the bar -- I left the men's room -- as I was leaving the men's room, a male came into the men's room and engaged Billy in conversation. I waited for Billy at the bar. Billy came out and met me at the bar. I asked Billy can I have a phone number where he could be reached at. He wrote down his name and a telephone number of the bar. I told him I would let him know how I liked the cocaine at a later time, during the week or the following week.

I left the bar and met with the surveillance officers. At this time the cocaine was testedfor narcotics. The result was positive for cocaine.

I returned to the office -- excuse me. I gave

Police Officer Herlihy the narcotics at which time he returned to the office to process the narcotics.

MR. MAC BETH: May I have this marked as Government's Exhibit 2 for identification.

(Government's Exhibit 2 marked for identification.)

xx

Q Officer Jackson, I show you what has been marked as Government's Exhibit 2 for identification.

Can you identify what that is?

A Yes. It is the two ounces I purchased from Billy Vernon on August 27th.

Q How can you identify that as the narcotics that you purchased at that time?

A My name -- my signature appears on the bag. Police Officer Vance Herlihy appears on the bag, the case number and exhibit number is on the bag.

Q When did you sign the sheet of paper that appears on the outside of the bag?

A August 27, 1974.

Q That was the day of the purchase?

A Yes, it is.

Q Turning your attention now to October 3, 1974, were you on duty at that time?

A Yes, I was.

Q Will you tell the jury what happened in the course of that evening and would you try to keep your voice up? It is a large courtroom and sometimes it is hard to hear you in the back.

A Yes. Again I met with Group 9 surveillance officers at 114th Street and Morningside Drive. Plans were formulated --

MR. GOLDBERG: Your Honor, I can't hear.

THE COURT: Do your best to speak up.

A I met with the Group 9 surveillance officers at 114th Street and Morningside Drive. Plans were then formulated for another possible purchase of the exhibit from Billy Vernon.

I proceeded to 116th Street. I was driving a 1971 Cadillac. I met with Vernon in front of Jim McDaniels Bar. I told Billy I was interested in purchasing two ounces from him and that the last package I got from him I was very pleased with, I was satisfied with.

Q Which was the last package you had received from him?

A Excuse me?

Q Which was the last package you had received from him?

A The two ounces of cocaine.

Billy Vernon asked me did I want to go back to Country. I told him no, I would like to try some of the Cuban cocaine.

We entered into the Soul Expression Restaurant which is opposite Jim McDaniels Bar and we remained in that location for approximately 15, 20 minutes. The conversation I had with Vernon, Vernon stated to me that I should have been up here the earlier part of the week because two Cubans came in and they had a kilo of cocaine which they wanted to sell and the cocaine was of very high quality.

I told Vernon that I would like to try someone else's cocaine. At that point Vernon told me a few names of people that had good cocaine, who was dealing good cocaine. One name he mentioned to me I already bought cocaine from that subject. He was considered a major violator.

A male entered the Soul Expression Restaurant. Vernon told me that this particular guy he pointed out and his brother were selling some cocaine, but the cocaine was high, it was high in price. The cocaine could possibly take two cut. He also stated that the person who would sell you hand to hand, I mean getting the cocaine from a particular person by me giving him the money and him giving me the cocaine.

I told Billy I would like to try some of this

person's cocaine. He left the table, engaged this person in a brief conversation. A few minutes passed, Billy returned to me. Billy stated that this guy Lester and his brother David had two ounces of cocaine and they would be over my house -- meaning Billy Vernon's house, they would be over my house in approximately an hour with the two ounces.

I stayed in the restaurant for approximately 20 more minutes with Vernon. At that point we left the restaurant, entered 125 West 116th Street which is a few doors down from the restaurant. We entered Vernon's apartment. We stayed in his apartment approximately an hour. There was a knock at the door. Two males, black, entered and I was introduced to these persons as Lester and David, alleged twin brothers.

David Bell removed a clear sealed cellophane bag from his jacket pocket. He opened it, poured the contents on the kitchen table. I was standing, Lester Bell was standing, David Bell was seated at the table with Billy Vernon. He poured the contents of the envelope on the table and asked me if I wanted a taste and I told him no, I didn't feel like tasting it right then.

Billy Vernon snorted some of the cocaine. Lester and David Bell snorted some of the cocaine. I examined

the cocaine and I asked David Bell what do you want for it, and he told me $1,900.

I counted out $1,900. I handed the money to David Bell. David Bell counted the money and said okay. David and Lester Bell then left Billy's apartment.

I was seated at the table. I asked Billy for something to put the cocaine back into the container. Billy Vernon opened a trunk which was on the table or the washing machine. I observed brown manila envelopes, a scale, measuring spoons, pharmaceutical capsules. He handed me a playing card. I put the stuff back into the container and asked Vernon for the scale.

Vernon handed me the scale and the scale indicated that it was a little short of two ounces. I then gave Billy Vernon $100 for the introduction to Bell. We left his apartment, we left the building and I then met with Lester Bell in the Soul Expression Restaurant.

Q When you left the building, did you and Vernon leave alone?

A Yes, we did but there was one male in the building which I did not know.

Q What did you do after you left Billy?

A I went back to the Soul Expression Restaurant. I saw Lester Bell and I told Lester Bell that the package

his brother sold me was short and I wanted him to make the shortage up.

He told me his brother wouldn't be back for approximately half an hour. I then told him I wasn't going to wait up here with two ounces of cocaine on me, I would have to see his brother another time, just to tell his brother that he shorted me.

I then left with Vernon. I left from Vernon. I met back -- I drove back to the prearranged location where I informed the surveillance officers I made another purchase from David and Lester Bell and Billy Vernon.

At this time the cocaine was field tested for narcotics, with positive results.

I then returned to the Task Force office with the evidence and processing. The evidence was put into a plastic bag, sealed by a machine. The evidence was initialled and I then placed the evidence in the narcotics process clerk, and another date, another officer took the narcotics to the federal laboratory.

MR. MAC BETH: Would you mark this.

(Government's Exhibit 3 marked for identification.)

Q I show you what has been marked Government's Exhibit 3 for identification. Can you identify that or not?

A Yes. My signature appears on this envelope and Police Officer Vance Herlihy. Case number, date and the exhibit number.

Q What is that?

A Two ounces of cocaine which I purchased from Billy Vernon, David and Lester Bell on October 3rd.

Q That is the same narcotics that you just testified that you put in the plastic envelope?

A Yes, it is.

Q Turning your attention now to October 23, 1974, were you on duty at that time?

A Yes, I was.

Q Would you describe to the jury what happened in the course of the evening of October 23rd?

A Yes. I met with Group 9 surveillance officers on 114th Street and Morningside Drive. Plans were formulated for another possible purchase of narcotics. I proceeded to 116th Street and Lenox Avenue. I was driving a 1971 Cadillac at the time. I met with Billy Vernon. I informed Billy Vernon I was looking for four ounces of cocaine. He asked me did I want to go back to Country. I told him yes, I did. We proceeded to 356-1/2 145th Street. At this location, Vernon entered the club and approximately ten minutes later came out.

He stated to me that Country was inside the club and Country had four ounces of cocaine for sale but I would have to front the money.

(Continued on page 38.)

4.B1

Q Wh. does it mean to front the money?

A To give the money in advance before you receive the narcotics. I was instructed by my supervisor not to front $3800.

Q What happened after that, after that conversation?

A Vernon stated that the four ounces would cost $3800. I told Vernon that I couldn't front the money. The only way I would front the money, if Country would come outside and meet me and guarantee the package would be all right. He stated to me that Country didn't want to meet me, and that Country was a little--he stated that Country was a little leery of me for the simple reason that I had a gun the last time I went into the place.

He also stated to me that I could have bought cocaine from Country directly if I didn't bring my gun in the club that evening--on the last purchase.

He also stated to me that before he could obtain narcotics from Country he had to spend $50,000 with Country before he was able to buy cocaine on a hand-to-hand basis with Country.

He stated to me that he could take me to approximately 147th, 148th Street and Seventh Avenue to a guy, I would give the guy the money, and he would go and get

the cocaine from Country; but I would have to pay a little more for the cocaine because this guy wanted to get his--either get some more money or some of the narcotics. I told him that I didn't want to do that, and that I would have to tell him no, I didn't want to buy the cocaine if I couldn't meet the guy or the guy wouldn't come out and meet me.

From there the deal was terminated. I proceeded back to 116th Street and Lenox Avenue, at which time Vernon exited the car.

I went back to a pre-arranged location where I met the field team and I informed them of what had taken place.

MR. MacBETH: The Government has no further questions of this witness, your Honor.

CROSS EXAMINATION

BY MR. MEYERS:

Q Did you testify before the grand jury that handed up the indictment in this particular case?

A Yes, I did.

Q Did you testify before the grand jury on April 23, 1975?

A (No response.)

MR. MEYERS: Would you concede that--

THE WITNESS: I don't know if I testified on that particular date.

Q When you testified before the grand jury, if you did, on April 23, 1975, did you make any reference whatsoever to a transaction that occurred on October 23, 1974?

A I cannot recall at this time.

Q When for the first time did you make any reference whatsoever to any transaction that occurred on October 23, 1974?

A On October 24th I made out a daily activity sheet.

Q Of '74, October 24th?

A Yes.

Q Did you bring that to the United States Attorney's attention at that time?

A I believe I did.

Q Did you make any notes of that transaction?

A No, not other than that--

Q I can't hear you.

A I did not, other than the activity sheet.

Q Other than what?

A The daily activity sheet.

Q Did you turn those notes or that daily transaction

over to the United States Attorney at that time?

A I believe I did.

Q Have you seen it since?

A No, I haven't. My daily activity sheet?

Q Any details or any notation as to a transaction that occurred on October 23, 1974.

A No.

Q You have not seen it since October 24, 1974?

A Correct.

Q And you did not, to the best of your recollection, you made no reference to that transaction on the day that you testified before the grand jury in April of 1974?

MR. MacBETH: Objection.

THE COURT: He says he doesn't recall testifying about it. I will sustain it.

Q Agent Jackson, getting back now for the moment to the first transaction that you testified to, that is, August 6th, I believe, was it of 1974?

A Yes, it is.

Q You were where, at 116th Street, West 116th Street?

A 116th Street and Lenox Avenue.

Q Were you in the company of anybody at the time that you went to 116th Street?

A Yes, I was.

Q Were you in the company, by any chance, of a man by the name of John Law?

A Yes, I was.

Q Is it a fact, Agent Jackson, that John Law was the informant that you referred to in this case?

MR. MacBETH: I object, your Honor.

THE COURT: Sustained.

Q Do you know a John Law, Agent Jackson?

A Yes, I do.

Q Did you know a John Law as far back as July of 1974?

A Yes.

Q And did you know a John Law as far back as July, 1974 pertaining to two narcotics transactions that Mr. Law had been engaged in under which he had been arrested?

MR. MacBETH: I object.

THE COURT: Sustained.

MR. MEYERS: Your Honor, may I approach the bench or the side bar and make an offer of proof?

THE COURT: You can make it later. It isn't necessary.

Q Under what circumstances did Mr. Law accompany you to 116th Street on August 6, 1974?

MR. MacBETH: I object, your Honor.

THE COURT: Sustained.

Q Is it a fact, did you participate at all, Agent Jackson--

A Police officer--

Q --in the prosecution or the arrest of John Law in 1974 sometime after May of 1974?

MR. MacBETH: Object.

THE COURT: Sustained.

MR. MEYERS: Your Honor, may I please approach the bench and make an offer of proof as to the specific defenses that I have raised in this particular case?

THE COURT: You may make your offer of proof at the next recess. This witness will be available if we have to call him back.

MR. MEYERS: I thought perhaps I could clarify this now and see what direction I'm going.

THE COURT: No. I don't see this as a proper line of inquiry. Next question.

Q You say that you approached my client, Mr. Vernon, on August 6, 1974 in the company of Mr. John Law.

Why did you approach him? What were you interested in?

A I was introduced to him by John Law. John Law

was with me at the time. Like I explained before I made, plans was made with group 9 and John Law, the confidential informant, for him to introduce me to Billy Vernon.

Q You were interested in purchasing narcotics, weren't you?

A Yes, I was.

Q You wanted to utilize, did you not, Mr. Vernon as an agent in buying those narcotics for you; isn't that so?

A No. Not at this time.

Q Did you believe that Mr. Vernon had the narcotics that you sought on him?

A I didn't know--

MR. MacBETH: Objection.

THE COURT: No, I will permit it.

A I would have to evaluate it since once I meet with the defendant and by his conversation, I would evaluate if he was a dealer or he would have to go somewhere.

MR. MEYERS: Your Honor, that is not responsive.

THE COURT: Yes. Wasn't the question why?

Q My question was, did you expect that Mr. Vernon would have the narcotics on him?

THE COURT: Is there an objection?

MR. MacBETH: Objection.

THE COURT: Sustained. Rephrase the question.

Q Getting back to Mr. Law for the moment, when you accompanied Mr. Law to West 116th Street prior to that time, had you or anybody on behalf of the Government paid anything to Mr. Law for accompanying you?

MR. MacBETH: I object.

THE COURT: Sustained.

Q And when Mr. Law accompanied you to West 116th Street that particular evening, prior thereto do you know whether you or any of the Government agents had made any promises to Mr. Law for accompanying you to West 116th Street?

MR. MacBETH: I object to this, your Honor. I object to this entire line.

THE COURT: Please, don't add anything further. Sustained. I have ruled on it. Next question.

Q Isn't it a fact, Agent Jackson, that Mr. Vernon was not the target of your inquiry; you weren't interested in picking up Mr. Vernon, were you, when you went to 116th Street on August 6th of 1974?

A I was interested in anyone who was dealing with narcotics.

Q But you weren't interested in picking him up, you were looking for bigger game, weren't you?

A I was looking for anyone who was dealing with narcotics.

Q Going back then to the incident of August 27, 1974, where did you meet Mr. Vernon then at that time?

A On 116th Street.

Q Was Mr. Law with you at that particular time?

A No, he was not.

Q And again, did you or any agent of the United States Government, to your knowledge, had they paid anything to Mr. Law for accompanying you, on any occasion whatsoever?

MR. MacBETH: Object, your Honor.

THE COURT: Sustained.

Q Did you participate in the investigation of any crime pertaining to narcotics that might have been committed by Mr. Law prior to July of 1974?

MR. MacBETH: I object.

THE COURT: Sustained.

Q Is it a fact, Agent Jackson, that you first heard of Mr. Law somewhere around July of 1974?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Is that the first occasion?

MR. MacBETH: Objection, your Honor.

THE COURT: Yes, sustained.

Q Did you have any conversation at all with the United States Attorney that to your knowledge had handled any prosecution pertaining to Mr. Law?

MR. MacBETH: I object, your Honor.

THE COURT: Sustained.

Q Insofar as purchases of narcotics that you referred to on these occasions, that is, on August 6th and on August 27th, you were not buying it, or were you buying them from Mr. Vernon?

A Yes, I was.

Q And you consider it a sale from Mr. Vernon to you?

A The definition of a sale is to give, to offer.

Q No, what I'm trying to clarify is this: When you approached Mr. Vernon on both occasions did you anticipate that he was going to act as your producing agent in bringing that narcotics to you, acting for you, the purchaser?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Insofar as the transaction on October 3, 1974 is concerned, where was the narcotics actually turned over?

A On what day, October 23rd?

Q Yes, October 3rd--

THE COURT: October 3rd.

A October 3rd, in Vernon's apartment.

Q Whose apartment?

A Billy Vernon's apartment.

Q How do you know it was his apartment?

A He stated to me that this is his apartment.

Q He told you that?

A Yes, he did.

Q Who was present at that time that the narcotics were turned over on that occasion?

A Myself, Billy Vernon, David Bell, Lester Bell. There was also a female in another room.

Q Is it a fact, Agent Jackson, that it was one of the Bell brothers who physically turned over the narcotics to you?

A Yes.

Q Is it a fact that it was to David Bell whom you ultimately made some complaint that the weight was insufficient or along that line; is that right?

A Lester Bell.

Q You didn't make that complaint to Mr. Vernon, you knew that it wasn't his narcotics; isn't that true?

A True.

MR. MacBETH: Objection, your Honor.

THE COURT: No, I will permit it.

Q Now, insofar as the October 23, 1974 transaction, you indicated if I recall correctly, that you had made some notation of that particular transaction?

A October 23rd?

Q The 23rd.

THE COURT: The daily activity report.

A Yes, my daily activity report.

Q What do you mean by an activity report, as compared with any other type of report of the transaction?

A Well, a daily activity report is very brief. The only thing that really occurs is the date, the time that you were out in the field, and what case number you was working on. It's different than a DEA 6, which is a formal report, and it's very lengthy in most cases.

Q In other words, is it a fair statement to make that this activity report that you referred to contained all the elements that would normally go into any other type of report as to the incident that occurred?

A No, sir.

Q Well, what's lacking?

A Everything is lacking. Like I said, all you put

down on your daily activity report is the date, what your activity was for that particular day. If you were outside, you would put outside. Uptown regarding such and such a case.

Q Agent Jackson, you had made reports pertaining to transactions of August 6th and August 27th, have you not?

A Yes.

Q Would you say that those were complete reports, containing all the data and material?

A I'd say it was.

Q Would you say that those two reports differed from the activity reports that you say you made on October 23, 1974--at least pertaining to the October 23, 1974 transaction?

A Yes.

Q The fact is, isn't it, Agent Jackson, you considered the October 23, 1974 transaction, if it occurred, as being entirely insignificant; isn't that so?

MR. MacBETH: I object.

THE COURT: Yes, sustained.

MR. MEYERS: No further questions. Except I do reserve the right--

THE COURT: You certainly do. No question about

that. Mr. Goldberg.

CROSS EXAMINATION

BY MR. GOLDBERG:

Q Officer Jackson, you have been a police officer for six and a half years?

A That's correct.

Q During the months of August and September and October of 1974, where were you assigned?

A To the New York Drug Enforcement Task Force.

Q You were at that time a New York City police officer; is that correct?

A That's correct.

Q And assigned, so to speak, on a special assignment?

A That's correct.

Q How long had you been assigned to the Federal Task Force?

A Two years.

Q Two years prior to that day?

A I was assigned in the 13th Division, Narcotics 13th Division in Brooklyn for two years.

THE COURT: When was the date you were assigned to that?

THE WITNESS: October 1, 1974--'73.

THE COURT: You had been there two years?

THE WITNESS: That's right.

Q You were assigned to the Special Task Force in October '73, is that your testimony?

A Yes.

Q Where is your present assignment today?

A At the New York Drug Enforcement Task Force.

Q You are still assigned there?

A Yes, I am.

Q You testified before a grand jury in this connection with this case; is that right?

A That's correct.

Q You testified, and you correct me if I am wrong, on April the 23rd, 1975--is that your testimony--

A I didn't say that--

Q Well, did you or did you not testify before a Federal grand jury or a grand jury in this building on April 25, 1975?

MR. MacBETH: The Government will concede that it is April 23rd--

MR. GOLDBERG: Your Honor, I object to counsel--

THE COURT: Please. Just a moment. Ask the question and we will have the witness answer it.

A I cannot recall if I testified on that date.

Q But you do recall events that occurred in August of 1974?

A Correct.

Q I show you this piece of paper, we can mark it for identification and ask you whether or not that refreshes your recollection as to when you testified before a grand jury.

A Yes. It says here April 23, 1975.

Q Regardless of what it says, does that help you refresh your recollection as to whether or not you testified before that body on April the 25th, or the 25th day of April 1975?

A Yes, I guess I might have testified here.

Q Now that you have seen that, it does refresh your recollection; is that correct?

A That's correct.

Q Do you remember what you did on the day prior to that, or April 22nd--April 24, 1975?

A If I can refresh my memory by looking at my activity sheets.

Q In other words, you'd have to look at your activity sheets to tell what you did?

A I would say so, yes.

Q Did you look at your activity sheets in connection

with this case?

A Yes, I did.

Q Did you look at your activity sheet with respect to what you testified occurred on October 23, 1974?

A My activity sheet does not reflect anything, only reflects I was in Court regarding this case.

Q In other words, this testimony that you gave earlier concerning Cubans and $50,000--

THE COURT: Please stay back at the lectern.

MR. GOLDBERG: I'm sorry.

THE COURT: All right.

Q And needing $50,000 front money, having to go to another address, I forget what, to meet somebody--this is all memory?

A When you testify--

Q Yes or no, officer?

A Can you repeat the question?

Q What you testified earlier about occurring on October the 23rd, 1974, is your testimony from your memory?

A Yes, it is.

Q And yet, you are not able to tell us what you did from your memory on April 24, 1975; is that correct?

A I have no reason to try to remember what I did on that day.

Q But you did have a reason for trying to remember what happened on October 23rd?

A October 23rd?

Q 1974.

A Right.

Q And what is that reason?

A What is that reason? It's an event that happened, I was trying to purchase narcotics from either Billy Vernon or Donald Payden. It was part of a case. That is the reason.

Q And you remember that. When did you first recollect that? Yesterday? The day before--

A No.

Q Did you have a conversation with Mr. MacBeth?

A No.

Q Did you in the last two weeks tell anybody about that incident on October 23, 1974?

A Yes, I did.

Q Who was it that you told?

A Mr. MacBeth.

Q When did that take place?

A It took place at one of the meetings that I had with him when we was going over the case.

Q How many meetings have you had with Mr. MacBeth?

A A few.

Q How much is a few?

A Three, four, maybe five.

Q Do you remember when the first meeting was in connection with this case that you met with Mr. MacBeth to discuss it?

A Approximately two weeks ago.

Q You don't have the date of the first meeting?

A I could find out. I could look at my activity sheet.

Q You don't recall, though, from your memory when it was--

A Approximately two weeks--

Q Excuse me.

Your Honor, may I continue my question before this witness answers?

THE COURT: Finish your question.

Q When you said approximately two weeks ago, do you have any recollection when it was two weeks ago, what day of the week, what date?

A It was on a Thursday. Approximately two weeks ago. Or three weeks ago.

Q Was it on that Thursday that you discussed with Mr. MacBeth the incident that you say occurred on October

23, 1974?

A I told him that all the facts I had about the case, I explained it to him.

MR. GOLDBERG: Your Honor, I ask that the witness be directed to answer my question, not to give an answer he'd like to give.

THE COURT: Just listen to the question and respond to the question that is asked of you. If you would, Mr. Goldberg, please remain at the lectern.

A Would you repeat the question?

MR. GOLDBERG: Would you repeat the question back to the witness?

(Question read.)

A Could have been.

Q Could have been; you're not sure, is that what your testimony is, you are not sure?

A Yes, I'm not sure.

Q When was your second meeting with Mr. MacBeth?

A Really, I don't keep a mental memory of exactly every time I meet with a District Attorney or U.S. Attorney.

Q Mr. MacBeth is not a District Attorney--

A I said or a U.S. Attorney. I have a lot of Court cases.

THE COURT: Do you have a recollection of the

second time you met with Mr. MacBeth?

THE WITNESS: A few days after that, your Honor.

THE COURT: All right.

Q You met with him on three other occasions after that; is that correct? Would that be about right?

A Three or four; five or six.

Q Each time you met with Mr. MacBeth, I take it that you discussed the case with him.

A Correct.

Q And discussed the facts that took place during the months of August, July, September and October of 1974; is that correct?

A That's correct.

Q And on dates that you had these discussions with Mr. MacBeth did you have with you your, what you call DEA 6's? Is that the form you referred to earlier, and your activity reports?

A No, I don't believe so. I had them I would say maybe the last two times I met with him.

Q The last two occasions you had those reports?

A Right. I had my own reports.

Q And did you have your activity sheets or your activity reports when you went to see Mr. MacBeth?

A Just the last time.

Q Was it just the last time that you remembered this incident that occurred on October 24, 1974?

A I didn't say that.

Q I am asking you, yes or no.

A No.

Q You had remembered it earlier?

A No.

Q And on no earlier occasion did you recall having your activity sheet present with you? Is that your testimony?

A No. It was not present when I discussed the matter on October 23rd; I don't believe I had my activity sheets with me.

Q And on no occasion prior to that next to the last or last meeting did you have with you your DEA 6 form?

A Yes, I had.

Q Pertaining to October 23rd?

A I didn't make out one.

Q There was no form for that day?

A Correct.

Q So can you tell us how it came to pass that you recall when in the last couple of weeks, if that be the case, that you recall these facts or this alleged occurrence

that took place on October 23, 1974?

A Since October 23, 1974 I didn't forget the facts that I was up there on October 23, 1974.

Q I am asking you when you discussed it with Mr. MacBeth for the first time.

A I would say the last two meetings I told him about it before. It could have been I told him about it on the first occasion.

Q Did Mr. MacBeth ever inquire and ask of you whether or not you had ever mentioned that incident before the grand jury?

A No, he didn't ask.

Q I ask you to look at your testimony in the grand jury of April 25, 1975 and tell me whether or not that refreshes your recollection as to what transpired and took place on October the 23rd, 1974.

(Pause.)

A A grand jury, you don't have to present all the facts to a grand jury.

MR. GOLDBERG: Your Honor, I object.

THE COURT: No, please.

A No, it doesn't seem anything in here reflects my testimony as of October 23, 1974.

Q Do you recall when it was that you first mentioned to any Assistant United States Attorney the incident that you speak of that occurred on October 23, 1974?

A Do I remember the particular date?

Q Approximately.

A A week ago. A week or two weeks ago. It was during the time I had meetings with him regarding the case.

Q In other words, it was only within the last two weeks that for the first time you discussed this incident of August 23, 1974 with any Assistant United States Attorney?

A I can't say that. I might have mentioned it to an Assistant United States Attorney that put the case into the grand jury, but I can't recall right at this moment.

Q Do you remember who that Assistant was?

A Assistant United States Attorney Mr. Carey.

Q You are saying you may or may not have discussed that with Mr. Carey?

A Right.

Q With the possible exception of Mr. Carey, your next discussion as it pertained to that incident was a few weeks ago or within the last few weeks?

A Right.

Q Do you remember when it was within the last two weeks that you did mention this to Mr. MacBeth? Was it the last couple of days or last week or the week before that?

A I believe it was on the first or second occasion when I met Mr. MacBeth.

Q You did tell him about this?

A Yes. I can't say exactly what day.

Q When you were talking about him in his room, did Mr. MacBeth make any notes with regard to that October 23rd incident?

A I have no idea.

Q Did he have a pencil in his hand?

A He had a pencil in his hand. He had a piece of paper on his desk. I don't know what he was writing on the piece of paper with his pencil. I have no idea.

MR. GOLDBERG: I ask for the notes.

THE COURT: No. Next question.

Q You testified an individual by the name of John Law was with you on August the 6th, 1974, is that right?

A Correct.

Q Is he a police officer?

MR. MAC BETH: I object, your Honor.

THE COURT: Sustained.

Q Do you know of your own knowledge whether or not John Law is either a civilian or a police officer?

MR. MAC BETH: Objection.

THE COURT: Sustained.

Q When, as you testified earlier, you made certain observations on 145th Street, you were in an automobile when you made the first observations on that street, is that correct?

A Correct.

Q And that automobile contained not only yourself but two other individuals; would that be a fair statement?

A That would be a fair statement.

Q One of them was this defendant, according to your testimony?

A Yes, it is.

Q And another was this person you describe named John Law, am I right?

A Correct.

Q Was this person who you describe named as John Law, with you from the time you arrived at that 145th Street area to the time you left eventually as you state you signed certain contraband?

A After I received the package from Vernon, I

drove to 140th Street and Eighth Avenue. The confidential informant left the car to go buy some cigarettes from the store. He returned to the car. That was the only time he was out of my sight during the time he was with me.

Q You say he went to buy some cigarettes?

A Cigarettes or candy.

Q You just referred to him as a confidential informant. What does that mean?

MR. MAC BETH: Objection.

THE COURT: No.

Q What is it?

A A confidential informant is a confidential informant.

Q What is he?

A He gives the police information on different things, on different subjects, dealing in narcotics. You might have a confidential informant in different branches of the Police Department, giving information to the police on different activities out in the street. This particular informant, he was a Drug Enforcement informant. His job was to introduce undercover agents or undercover police officers to people in the street that he knew that was dealing in narcotics. That is basically his job.

Q You say it was his job.

Who did he work for?

A What do you mean his job? That was his function.

Q That was your word.

A It was his function.

THE COURT: Next question.

MR. GOLDBERG: May I approach the side bar?

THE COURT: Yes, you have another engagement elsewhere.

Members of the jury, we will suspend at this time. This will be the first recess since this case started in which you will be away from us overnight. For some of you this has been a novel experience sitting on a jury and when you get home tonight you may be anxious to discuss the matter what you did today and what happened with members of your family or friends at home and they may be inquiring about you what did you do today.

I think all you can tell them is the Judge told me I can't tell you about it. Don't do it, don't talk with anybody about this case. You are the ones that are here, you are observing the witnesses, you will have to make the determinations in this case, not somebody who may have heard about another case some other time about something else.

They are not here, they are not listening to the witnesses, they are not hearing the instructions on the law that I give to you. The case has to be decided by you people and you alone, so don't discuss it with anyone and don't let anyone discuss it with you.

We will resume here at 9:30 in the morning. I have a matter that may carry over a little bit beyond 9:30 but it shouldn't be too long beyond then.

Have a pleasant evening and report back tomorrow morning at 9:30.

(Jury leaves courtroom.)

THE COURT: You may step down.

(Witness steps down.)

THE COURT: Mr. Meyers, are you trying to argue entrapment?

MR. MEYERS: I have three basic defenses that I intend to argue. That is why I was trying to go in a certain direction. Perhaps your Honor at that point hadn't conceived. My first direction is this, that insofar as the actions of the Government were they so reprehensible, if I can discover the facts to create a failure of due process to give this particular defendant a fair and proper trial.

The second thing is this: I maintain, and that

is why I was going in the direction of Mr. Law. My information is as I have recovered it, that Mr. Law was guilty of two separate and distinct, in fact three fairly large narcotics transactions in April and May pretty much about the same time that the allegations pertaining to Mr. Vernon was concerned.

My search of the records revealed that although the Department, and the Government was aware of that, they kept Mr. Law on ice. They did nothing, even though they knew about it, until July of 1974 when according to the 3500 material he called the DEA office and at that time he presumably was given a so-called informants number and he started to cooperate and as a result of the cooperation, the records reveal that on the three narcotic charges on Counts 1 and 2 which were fairly large, he was first -- he wasn't entitled until November of 1974 and my impression is that the indictment was merely a pro forma indictment to satisfy the record.

He was given a suspended sentence on Counts No. 1 and 2 and Count No. 3 was dismissed; and I maintain that there was a motivating factor for that man and therefore there was an entrapment.

THE COURT: You don't prove entrapment through

the fact that you have a confidential informant that introduce an undercover agent to a suspected dealer.

MR. MEYERS: He was not an informant at all, he was a participant in the action.

THE COURT: You are doing it through this witness. All you have to do is cross examine about what this witness testified to, not Law's activities.

MR. MEYERS: But I do intend and I am going to request, your Honor, as a matter of a defense in this particular case, I would ask the Government to produce Mr. Timbers who handled the prosecution on the John Law matter to determine was there an agreement, was this man kept on ice, was he told to go out, you go out and pick up a bounty and for every individual you bring in, we will give you a gold star which would lead to a suspension --

THE COURT: That would be relevant if Mr. Law came in and testified but not when the police officer testified.

MR. MEYERS: The point is, through Agent Jackson, I am interested in determining of when they gave Mr. Law a confidential informant number, all that was window dressing.

He was never an informant. He was merely trying to save his own skin.

THE COURT: He may well be but all he did as far as I am concerned in this, he was the one -- all that this witness testified, he was the one that introduced him to the other. From there on I don't think there is anything you can inquire about from the police officer about the Law situation.

MR. MEYERS: But if out of the Government's testimony it develops that they instigated this transaction, then we have the first element on an entrapment defense and the burden of proof would fall on the Government to show a predisposition on the part of my client to be nonentrapped.

THE COURT: The burden of proof falls as I say --

MR. MEYER: The burden of entrapment rests with the Government to establish beyond a reasonable doubt, but I think in this particular circuit they have divided it into two elements, that element which determines whether or not there was any inducement. If we can demonstrate that, then the burden shifts on the second element, a predisposition rests on the Government and I have many cases to support that position.

THE COURT: I think that the testimony of this --

MR. MEYERS: The third thing I was developing

is, it is true the Government's indictment speaks of distribution, but as it develops in this case, the Government is saying there was a sale and therefore if there was a sale, I can take the position, my client can take the position that he was merely a procuring agent and he could -- he was acting on behalf of the Government, which I couldn't do if it was merely restricted to jurisdiction.

THE COURT: You are going to reverse about all of the Second Circuit cases in connection with narcotics sales. You are just about to have me reverse the Court of Appeals for the Second Circuit of all the cases that I am familiar with.

MR. MEYERS: That may very well be.

THE COURT: The Second Circuit is the one that will do it, not I.

MR. MEYERS: I am just laying the foundation from this man that there was no confidential agent, that this man was a participant, that there was a Mr. Law.

If I can develop and show how Mr. Law came into the picture, how they sent him out, you go out and get two, three, four individuals and we will permit you to plead, to take a suspended sentence on two very important -- there was a motivating factor for it and they instigated

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the particular transaction.

THE COURT: I was not aware the confidential informant was known here, but evidently that is so. I thought it was a great big secret but it is not so so apparently he is available to both sides.

MR. GOLDBERG: I want the address of the confidential informant.

THE COURT: Ask Mr. Meyers. Mr. Meyers will give it to you.

MR. GOLDBERG: I have a report here that is obviously writeen, provided me by Mr. MacBeth that obviously is the confidential informant's report and that report as well as this officer's testimony indicates that this confidential informant was present during what these, during the alleged transactions, namely what took place on 145th Street since the Government in effect is saying that is the transaction.

As a witness, your Honor, I call for either his production or the name and address so I can have the opportunity of subpoenaeing him.

MR. MEYERS: There is no confidential informant. That term has been used in this case to refer to Mr. Law who participated.

THE COURT: Read the Ruberio case.

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MR. MEYERS: You mentioned if there might have been an error of law, you wouldn't mind us bringing it to your attention.

On the October 23rd incident, if it develops, and it has developed that there was no testimony before the grand jury, you have more than a mere amendment of the indictment --

THE COURT: No. That is nothing more than another act. As a matter of fact the indictment doesn't even have to contain any of the overt acts. It is not a count, it is an overt act.

MR. MEYERS: I don't know whether we are dealing with it as an overt act or substantive count and even a substantive count -- if the indictment stands as it is -- how are we in a position to meet -- in that way the Government can go on up to the very date of trial keep adding overt acts. All they are required to was one.

THE COURT: All they have to do is prove one. They are not required to put all the overt acts in the indictment.

MR. MEYERS: I don't think the indictment can be as elastic as all that.

THE COURT: There is a point that comes when it is a surprise and whether there is sufficient time

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to prepare and it is in my discretion and I have held there is sufficient time to prepare and it was not a surprise.

MR. MEYERS: In relation to the defenses I propose --

THE COURT: You go ahead with your defenses.

MR. MEYERS: I propose to interrogate Agent Jackson on the question, you speak of an informant -- when d d he become an informant, under what circumstances, is he a registered informant. I am trying to lay the groundwork for the motivating fact.

THE COURT: You made your offer of proof and I don't believe it is relevant.

MR. MEYERS: If I deem it necessary, would your Honor direct Mr. MacBeth to produce who handled the prosecution of the John Law matter?

THE COURT: Mr. Timbers will be available if you need him. I don't know what that is going to do producing Mr. Timbers here.

MR. MAC BETH: I object to that. It doesn't seem to me to have any relevant to the cross examination of this witness.

THE COURT: If you want to call Mr. Timbers and ask him to make himself to be available as a

witness, fine. When I will let you question him on anything is something else.

The only other thing I have is did you take any notes that might be considered 3500 material that I don't want read in front of the jury.

MR. MAC BETH: Perhaps I can clarify what happened. There are no notes --

THE COURT: If there are no notes, there are no notes.

Gentlemen, promptly at 9:30.

(Adjourned to 9:30 a.m., November 14, 1975.)

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Chris Jackson	16	39		

EXHIBIT INDEX

Government	Identification	In Evidence
1		22
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United States of America

vs 75 421

Donald Payden, a/k/a Country,
Billy Vernon

New York, New York
November 14, 1975
10:00 a.m.

(Trial resumed.)

(In open court, jury not present.)

MR. GOLDBERG: Your Honor, Mr. Payden was sitting by the table. I just didn't see him.

Your Honor, I have an application and that is to strike the testimony, the out of court declarations alluded to yesterday on the stand by the undercover officer on the grounds the Government has failed to establish independent of that, any conspiracy.

THE COURT: They haven't put in their case, yet. No objection was made anyway.

MR. GOLDBERG: There was an objection to the first question.

THE COURT: Objection made as to hearsay, I sustained.

I can't tell how you are trying your case. Whenever you made an objection to hearsay or anything like that, I sustained the objection. When no objection

was made, I didn't rule. If you look at the record, you will see that is so. I can't judge how your case is going.

MR. GOLDBERG: This officer has testified. They have not through this officer through testimony or evidence any proof independent of the oral statements made out of court.

THE COURT: You haven't had the Government's case yet. That motion is premature.

MR. GOLDBERG: I ask for an instruction to the jury that they take this testimony subject to the Government --

THE COURT: If you make that objection at the time this was in, I would have ruled on it.

MR. GOLDBERG: I am making it now, a formal motion to strike that testimony.

THE COURT: It is too late.

Any other motion?

MR. GOLDBERG: At this time I also move for a severance on the grounds there is no way -- I can't call Mr. Vernon to the stand and in light of that, I can't impeach any of those out of court statements.

THE COURT: That motion is denied.

MR. GOLDBERG: I have one more motion and that is as it pertains to the undercover -- rather the

informant, the cooperating individual who has been identified by name. It seems to some extent through questioning, it has been corroborated that this man is known as John Law.

In looking at the statements, the statement given to me by Mr. MacBeth made by this cooperating individual on I believe the seventh day of August, 1974, that there are a number of inconsistencies between that statement and the testimony of the officer on the stand.

In view of that, your Honor, and though I have read Roberio, I believe it is critical that this man who is in fact a witness and witnesses for all intents and purposes since the crime is alleged by the Government, be present.

We have his name. If the Government doesn't want to produce, I would like to call him as my witness and I can't call him unless I have his address and where this man is located.

I ask the Court to grant the subpoena which I will prepare if and when I can get this man's address.

THE COURT: We can take this up at the next recess. The jury has been sitting in there for 20 minutes. If you have applications to make like this, they should be made before the time for the jury to come in. We

can do that at the next recess. I thought you had some application to what has been going on here immediately.

Anything else?

MR. GOLDBERG: That is the extent of my application.

THE COURT: Put the witness on the stand and bring in the jury.

C H R I S J A C K S O N, having been previously duly sworn, resumed the stand and testified further as follows:

(Jury present.)

THE COURT: Good morning, ladies and gentlemen.

Proceed.

CROSS EXAMINATION

BY MR. GOLDBERG: (Continued)

Q Mr. Jackson, prior to August 6, 1974, had you ever seen John Law?

MR. MAC BETH: Objection.

THE COURT: Sustained.

Q Do you know whether on January 6th John Law was in fact a registered informant and had a number?

MR. MAC BETH: Objection.

THE COURT: Sustained.

Q Did you have a conversation on August 5th or

6th with an officer by the name of Herlihy?

A Yes.

Q During that conversation with Officer Herlihy, did Herlihy relate to you a conversation he had had with John Law?

MR. MAC BETH: Objection.

THE COURT: Sustained.

You may answer that yes or no.

THE WITNESS: I can't answer that yes or no.

THE COURT: Did he or didn't he?

THE WITNESS: I can't recall.

Q When you arrived at 116th Street and Lenox Avenue on August 6th, were you under the impression you were to by a quantity of drugs from Billy Vernon?

MR. MAC BETH: Objection.

THE COURT: Sustained.

Q Were you told prior to that date by Herlihy that Billy Vernon was in possession of a large quantity of drugs?

MR. MAC BETH: Objection.

THE COURT: Sustained.

Q As a police officer with the City of New York, did you take any special courses in connection with narcotics?

A Yes.

Q When someone in the drug area or the drug scene mentions cocaine with rocks in it, does that indicate to you something about the purity of the substance?

A Yes.

Q What does that description of a substance when it is characterized as being rocky rather than granular mean?

A The rocks are supposed to be the most potent part of the cocaine. Just like a little rock.

THE COURT: Please try to speak up.

A (Continuing) Little pebbles or little rocks in it. It is supposed to be the most potent part of the cocaine.

Q Did you ever, on August 6th, have occasion to examine physically the drugs you say you purchased on that day?

A Yes.

Q On examination, what was the substance, rocky or granular?

A Very little rocks in it, very small little rocks. would say 98 per cent of the cocaine was in powder form.

Q Would you come to any conclusion with regard to its purity based upon the substance being 98 per cent granular and two per cent rocky?

MR. MAC BETH: Objection.

THE COURT: Sustained.

(Continued on page 83.)

Q When did you make that observation with regard to the makeup of the substance?

A Excuse me?

Q When did you make that observation with regard to the makeup of the substance?

A At 145th Street and Eighth Avenue--140th Street and Eighth Avenue.

Q 140th and Eighth Avenue.

Were you with other officers at that time?

A No, not at that time. I was with Billy Vernon.

Q You were with Billy Vernon alone at that time?

A Yes, I was.

Q That man John Law wasn't with you?

A No, he was not. He stepped out of the car and went to the store.

Q When you say that on August 6th you met with the unit 9--

A Group 9.

Q Group 9, what did group 9 consist of?

A Police officers, State Trooper and Federal agents.

Q How many officers were in group 9 on that day?

A Approximately six or seven.

Q Would that be police officer Harrington?

A Yes.

Q Without guessing, do you have any notes that would refresh your recollection as to who was--

A Yes, I do.

Q Would you refer to them?

A Sergeant Porter, Special Agent Major, Police Officer Herlihy, Detective Wright, Police Officer Crowe, Police Officer Harrington.

MR. MacBETH: Could we have the documents from which the witness is looking at identified?

THE COURT: They will be marked for identification.

Q You say Sergeant Porter?

A Yes.

Q And Special Agent Major?

A Correct.

Q And Detective Wright?

A Correct.

Q And Police Officer Jackson--that is yourself?

A That is myself.

Q And Police Officer Crowe?

A Correct.

Q And Police Officer Harrington?

A Correct.

Q And Police Officer Herlihy?

A Correct.

Q Would it be fair to state that Herlihy, Harrington, Crowe and yourself were then with the New York City Police Department?

A Yes.

Q And how about Wright, Major and Porter?

A New York City Police Department. Special Agent Major, he is a Federal officer. The rest are police officers.

Q So that Major is the only Federal agent?

A Correct.

Q Assigned to group 9; is that a fair statement?

A No, I don't believe so.

Q Well, you mean--

A There is other--

Q On this case, let's take it that way. On this case.

A No. There is other agents in group 9.

Q What I meant, as far as this instant case, this investigation, were these the only officers involved in this investigation?

A On that particular day, yes.

Q Did you earlier that day have a meeting with

group 9?

A Yes.

Q And did you discuss your specific assignments that you were going to do that day, have that day?

MR. MacBETH: Objection.

THE COURT: No, I will permit it.

A I was asked to possibly make a buy from Billy Vernon on that day.

Q Where did you meet to discuss this?

A At 114th Street and Morningside Drive.

Q Was there any meeting prior to that meeting in connection with this investigation, that day?

A Yes, I would say so. At the office.

Q Your job, your designation was to make the actual purchase; is that correct?

A Correct.

(Continued on page 87.)

Q Were you informed as to whether or not there would be any backup team watching you?

MR. MAC BETH: Objection.

THE COURT: No, I will permit it.

A Yes.

Q Do you know who was involved in that backup team?

A Yes.

Q Who was involved in the backup team?

A The police officers I just named.

Q Were all of those officers in the field, so to speak, or, you know, out in the area?

A Yes.

Q Do you know how many automobiles were used --

A No, I do not.

Q Excuse me?

A No.

Q You had one automobile, is that correct?

A Correct.

Q You were using what is known as a flash car?

A Correct.

Q That was on that day --

A A 19 --

Q '70 or '71 Cadillac?

A '71.

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Q Incidentally, was the '71 Cadillac used on the other days as well?

A May I refer to my reports?

Q Sure.

(Pause.)

A This was I believe a 1969 Buick 225 Electra, tan in color, with brown insides and a brown top. I was supposed to use the Cadillac that day, but --

MR. GOLDBERG: Objection to this statement.

THE COURT: You asked him if that was the only car used. No, I will permit it. The question was, was any other car used.

THE WITNESS: That and the '71 Cadillac.

Q So on August 6th you had a 1968 Buick?

A '69, I believe. '69 or '70.

Q Was that the only time you used the Buick?

A Yes.

Q The other dates you used a '71 Cadillac?

A Yes. Same color, basically the same description.

Q Did you see any other automobiles either at 114th Street when you met with your team or any other time that day, by members of your team?

A Yes.

Q How many other automobiles were used by

surveillance, to your knowledge?

A Gee, at least four.

Q At least four automobiles?

A At least four, I would say.

Q And did you have walkie talkies? Did they have walkie talkies, not yourself?

MR. MAC BETH: Objection.

THE COURT: No, I will permit it.

A They had radios in the cars.

Q So there was a method through which these officers could --

A Communicate, yes.

Q Communicate with each other?

A Yes.

Q Did you have any communicating equipment on you?

A No, I did not.

Q Have you ever heard of a Kel transmitter?

A Yes, I heard of Kels. I wore Kels, I wore Nagras. It is a recorder.

Q You have used them in the past?

A Yes, I have.

Q You have had a Kel transmitter placed on your person?

A No, I did not.

Q A Nagra tape recorder?

A No, I did not.

Q You have never in the past -- I'm not talking about that day, have you in the past ever had a Kel transmitter placed on your person?

A Yes.

Q That instrument is used to pick up conversations that you are privy to?

A Yes.

Q So other officers can hear those conversations?

A If they are working.

Q If there are other officers listening?

A No, I said if the Kel is working. I would say 98 per cent of the time the Kels do not work.

Q 98 per cent of the time the Kell transmitters don't work?

A In my experience, yes.

Q Is that one of the reasons why you chose not to use it that day?

A Yes, among other reasons.

Q Among other reasons?

A Yes.

Q How has your experience been with regard to Nagra tape recorders?

A Nagra I find that it is very clear when you are using it. But I also find it very bulky. It is a machine approximately this large (indicating) about this wide (indicating).

You place it on your body. Most of the time you use a bellyband. You have to tape it to your body. It's very awkward, very large. It is larger than my gun. I prefer not to use a recorder of any kind for the simple reason that a lot of times I don't know where I am going to make a buy and I do go into after hours clubs and occasionally I do get searched.

Q How many times have you in the past worn either a Kel recorder or a -- a Nagra recorder or a Kel transmitter?

A I believe I wore a Nagra twice.

Q Twice in your experience with the Police Department?

A Yes, that I can recall at this moment.

Q How about a Kel?

A A Kel, approximately eight times. The Kel, at the time I used the Kel, was for a safety factor, not for a listening device. It was for a safety factor.

Q The Nagra tape recorder records any conversation you would have with someone?

A Correct.

Q And the Kel transmitter would monitor that -- would transmit that conversation to other officers who would be monitoring it, is that correct?

A Yes.

Q On this particular day you chose not to employ either one of those investigative tools?

A I tell you, the Federal Government, they don't like for you to wear Kels; they try to keep away from that, since Watergate.

Q Excuse me?

A Since Watergate, they try to keep away from Kels, different type of recording devices.

Q This is 1974, though --

THE COURT: All right. let's proceed.

THE WITNESS: Watergate was going on.

Q You went out with money given to you by the Federal Governme t, is that correct?

A Correct.

Q And on August 6th how much money did you take with you when you received the money? How much buy money did you have on you?

A I believe it was $1,000.

Q Did you record the denominations of the bills or

the serial numbers of those bills?

A Yes.

MR. GOLDBERG: Do you have any records here? I haven't seen any.

MR. MAC BETH: I don't have such a record here.

THE COURT: Do you know if there is any indication as to the number of the bills?

THE WITNESS: No, there is made out on a separate form. It is usually held by the case officer.

THE COURT: You don't have it here?

THE WITNESS: No.

THE COURT: Very well.

Q Who is the case officer?

A Police Officer Herlihy.

Q In this Group 9, would it be fair to state that you had a superior officer in that group?

A Yes.

Q Who was your superior officer?

A Police officer -- excuse me, Sergeant Porter.

Q Would there be anybody else who would be superior to you in that group that day?

A His assistant, Special Agent Majors.

Q So you took your orders from Majors and Porter, is that fair?

A Yes, I would say.

Q In your experience with narcotics enforcement, have you ever used photographic surveillance?

A Occasionally, yes.

Q Does that employ still photography or moving pictures and video tape on occasion?

A You could have still, you could have video tape.

Q Excuse me?

A You could have still, tape or video tape pictures.

Q Have you been in investigations that involved those two investigative tools?

A Only still pictures.

Q Was that tool employed in connection with this investigation?

A It is kind of difficult taking pictures at night.

THE COURT: Was it employed?

THE WITNESS: No.

Q These reports, form DEA 6, were they filled out that day, the day you had this incident?

A A rough copy, or possibly the next day. When I make a buy or I am out on surveillance and I am required to make a 6, I make a rough copy. I put down all pertinent information on a piece of paper.

Q Would you look at your DEA form 6 for August 7, 1974.

Looking at the bottom of that report, is there a date as to when that report was made? Does that refresh your recollection as to the date?

A No.

Q Is the date May 26, 1974?

A This date is when Special Agent Major signed it. That is what that date indicates.

Q Do you have your rough notes with you?

A No.

Q Do you know where they are?

A In the garbage pail.

Q You threw them away?

A Yes, after I made this official report, and I handed it to my supervisor, he checked it. From there it goes to the secretary. She types it up. It comes back to me, I proof read it for the facts and to make sure there are no mistakes on it and I discard the scratch copy.

Q When you make these reports up, do you confer with other officers?

A I might have to for the time, something like that.

Q Do these reports sometime indicate not only your observations but the observations of other officers?

A Not my report.

Q On August 6, 1974 when you met your group, was Donald Payden the target, at the time you met your group in the morning?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q On August 6th at 9:00 p.m. at 114th Street and Morningside Drive, was the name Donald Payden mentioned?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q When you met Mr. Vernon on August 6th, did he have an automobile?

A Not to my knowledge.

Q Did you see one on any occasion?

A Yes, I did.

Q What occasion was that?

A One day I was up there. I observed Vernon parking an automobile.

Q Was this any of the days you spoke about in your direct testimony yesterday?

A There was one of the days.

Q Do you know which day it was?

A No, not exactly.

Q Your testimony was that you suggested to Mr. Vernon that you go in your car?

A I asked him if he wanted me to drop him up there.

Q Excuse me?

A I asked him if he wanted me to drive him to his connection.

Q Does the word "connection" have a connotation to you?

A Excuse me?

Q Does the word "connection" have a connotation to you?

A Yes.

Q What does that mean?

A It means his connection, where he could go to get a supply of narcotics.

Q He told you he had a connection on what street?

A He told me he had a Cuban connection.

Q What street?

A Approximately 148th Street, 149th Street and Broadway.

Q 148th Street, 149th Street?

A And Broadway.

Q Was there any mention at any time of an address on 155th Street?

A I believe so.

Q Was that another connection or the same connection?

A I would say it was the same connection. It is just that these people hung in the area of 149th, 150th Street, which is a heavy area for cocaine.

Q What do you mean?

A It is a heavy area for cocaine. A lot of people deal in cocaine in this area.

Q You got into an automobile, you, Mr. Payden--excuse me, you, Mr. Vernon and this John Law, right?

A Correct.

Q And you proceeded north?

A On Lenox Avenue.

Q From?

A From 116th Street.

Q 118 West 116th Street?

A Correct.

Q Can you tell us how you proceeded, what road you used, what street?

A Yes. I was parked on 116th Street. I made a left-hand turn on 116th Street onto Lenox Avenue. I proceeded to 145th Street.

Q When you got to 145th Street, did somebody tell you to take a turn?

A Yes, he did. That was Vernon. He told me to make a left-hand turn right here.

Q And at that time Mr. Law was in the automobile?

A Yes, he was.

Q Did he give you any reason at that time to take a left-hand turn?

A Not really. He was directing me to a place. He was telling me how to get to it.

Q To get to where?

A In the area of 150th Street and Broadway.

Q Before you took this left turn, was the name Donald Payden or Country used?

A No.

Q And you took this left turn on 145th Street and what happened?

A I proceeded west on 145th Street. Between Edgecomb and St. Nicholas, we passed through the block and Vernon stated, "I just seen Country. Country got the bet coke around."

Q That was the first time you heard that name mentioned?

A No.

Q That day?

A Yes.

Q Was Mr. Vernon in the passenger seat?

A The front passenger seat.

Q And you were in the driver's seat?

A Yes.

Q And was John Law in the rear seat?

A Yes, he was.

Q You were on the north side of 145th Street, would it be fair to say?

A Yes.

Q It is a two-way street?

A Yes.

Q Where was Mr. Payden?

A I didn't see him. We passed him. I made a U-turn and we turned to 356-1/2. I observed Mr. Payden directly across the street wearing a gray T-shirt with some letters on it and slacks. I observed Mr. Vernon go directly to Mr. Payden.

Q I was just asking where Mr. Payden was.

A He was acorss the street, directly across the street from 356-1/2.

THE COURT: Next question.

Q Was he with anyone?

A There were other males.

Q How many males were in that vicinity?

A I would say four or five.

Q Did you at that time have occasion to look across the street at 356-1/2 145th Street? Was that area crowded, directly in front of 356-1/2 145th Street?

A No.

Q Was the street crowded at that time?

A No, I wouldn't say so.

Q Was there a lot of traffic in the area?

A There was movement. There was people in the street. The street wasn't crowded.

Q Was there traffic?

A There was traffic.

Q Was there heavy traffic?

A No, I wouldn't say that.

Q You say that Mr. Vernon got out of the automobile and walked across the street?

A Correct.

Q He approached Mr. Payden who was now on the north side of 145th Street across the street from 356-1/2 145th Street, which would be the south side, is that correct?

A Yes.

Q What did you observe exactly when Mr. Vernon walked across the street and got on the sidewalk?

A I observed Billy Vernon walk directly over towards Country, engaged him in a brief conversation and returned to my vehicle.

Q How long did this brief conversation, as I recall it, last?

A Two to three minutes.

Q Were there any other individuals in the vicinity of that conversation?

A I would say in the vicinity.

Q You said that Mr. Payden was with four or five other individuals?

A Not close. They were mingling around the bank. I would say each individual was maybe three to four feet away from each other when Vernon went over to Payden and then Payden stepped away from the crowd and engaged Vernon in conversation.

Q Payden stepped away from the crowd?

A I would say so, yes.

Q You are saying there was a crowd across that street?

A The four or five individuals who were out there. Not a large crowd.

Q Is there anything in your report that indicates that Mr. Payden walked away from this crowd?

Would you examine your reports, sir?

A I don't have to examine it. No.

Q Do you know whether or not from your position across the street, whether or not Mr. Vernon was talking to anybody else besides Mr. Payden?

A To my observation, he was only talking to Donald Payden.

Q Where did the other individuals go, if you know?

A They didn't go anywhere.

Q They stood there?

A They stood right there. Most of the individuals were leaning on a car.

Q So they were on the sidewalk?

A Yes.

Q Was Mr. Payden when you first observed him leaning on the car?

A No.

Q He was standing in the middle of the sidewalk?

A Yes.

Q People were three or four feet from him?

A Yes.

Q Did you see Mr. Payden talking to any individuals in that group before Mr. Vernon got there?

A The first time I observed him when I made the

U-turn and came back to 356-1/2--

Q I am talking before that. You said you didn't observe him at all before the U-turn.

A No, I didn't observe him and the other males.

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Q And he was just standing there?

A He was standing [illegible].

Q Mr. Vernon walked up to him, spoke to him; is that your testimony?

A That is my testimony.

Q And you couldn't hear what was said?

A No.

Q And Mr. Vernon you say came back to your automobile?

A Right.

Q Did he get inside?

A Yes, he did.

Q Told you at that point, related to you a part of the conversation he said he had with Mr. Payden, is that to the best of your testimony?

A Yes.

Q At any time prior to that, prior to that incident on 145th Street, did you engage Mr. Vernon in a conversation pertaining to how much drugs you wanted to buy that day?

A Yes.

Q What did you tell Mr. Vernon you wanted to purchase?

A An ounce of cocaine.

Q Did you tell Mr. Vernon how much you were prepared to pay for that ounce?

A No.

Q So there was no mention of money?

A Not at this time.

Q You did, however, mention, and you correct me if I am wrong, that you did have certain requirements so far as purity was concerned, or the quality of the drug?

A Yes. I was looking for high quality cocaine.

Q High quality cocaine?

A Yes.

Q When you are talking about high quality cocaine, you are talking about cocaine that could be cut?

A Correct.

Q Did you specify how many times you would want to cut it?

A I told him I was looking for something which possibly could take a two cut, which would be about 35 per cent, 25 per cent purity.

Q In other words, you wanted to dilute the sub-

stance--

A I wanted to whack it two times.

Q In effect, mark it down to a third of its purity when you purchased it?

A Right.

Q Is that correct?

A Yes.

Q And you characterize cocaine being 30 per cent pure as being good quality cocaine?

A Yes, it is.

Q Would you characterize cocaine that is 10 per cent pure as good cocaine?

A No, I would not. It is garbage.

Q And it your intention, as far as the people were concerned, you told them you were going to sell this cocaine, in effect?

A Yes. I was posing as a dealer. I told them if I was going to buy an ounce, I wanted good stuff for the money I was spending.

Q Did you know on that day, since you had experience, did you know what the retail price was of an ounce of cocaine?

A It varies.

Q I am talking about on August 6, 1974 with regard

cocaine that could be cut twice.

A I don't quite understand your question.

Q Aren't there various factors that dictate the price of cocaine?

A Yes and no.

Q Would you say supply is a factor that would dictate price?

A Supplier?

Q The supply of the cocaine at the time.

A Yes.

Q Wouldn't the quality of the cocaine dictate the price?

A You never know what you are buying out there.

Q I am talking about before you bought it.

THE COURT: You asked him the question. Let him finish.

A You could buy 1.1. You could buy 98 per cent cocaine. I have no idea which is 1.1 or 98 per cent. I am not a chemist. The only thing I do is buy the cocaine. I submit the cocaine to the laboratory to be analyzed.

MR. GOLDBERG: Your Honor, I direct the witness to answer my question, not make speeches.

THE COURT: What is the next question?

Q Were you told to respond in a certain manner

when I asked my questions?

THE COURT: Please, no directions to the witness. Any direction to the witness will be done through the Court.

Next question.

Q On August 6, 1974, what would the market price be for an ounce of cocaine that was 33 per cent pure?

A There is no market price for cocaine, it varies. You can pay $800 for an ounce of cocaine which is 35 per cent and I pay $1500, $1600 for an ounce of cocaine which is 4 or 5 per cent. There is no specific market. In a lot of cases you might get high quality cocaine from a good dealer. The price is low because he could afford to sell you an ounce of the cocaine for $800 because he is buying cocaine on a large scale. Every time he whacks that cocaine it doubles his value in money.

(Continued on page 109.)

Q So you are saying that there are a lot of variables that affect the price; is that correct?

A Yes. Depends on who is the dealer.

Q And you never mentioned any price at all to Mr. Vernon?

A Not at 116th Street.

Q What?

A No, I never mentioned a price.

Q Did you mention to Mr. Vernon at any time that you were going to give him moneys as a gratuity for helping you find people?

A No.

Q No?

A No.

Q But you did, according to your testimony yesterday.

A Not on August 6th.

Q On some future date?

A On some future date.

Q As a matter of fact, you gave him money more than once?

A That's correct. There is a reason behind that.

MR. GOLDBERG: Your Honor, I direct the witness--

THE COURT: Just answer the question. Next question.

Q After Mr. Vernon came back from this conversation he had, as you call it, with Mr. Payden where did he go?

A He came back and sat in my car.

Q After that where did he go?

A He went back directly across the street and engaged Country in another conversation.

Q Is this Donald Payden at the same place where he was a moment ago?

A Yes, he was.

Q And with the same group of people there?

A Yes.

Q They didn't go anywhere, none of them left?

A No.

Q Were they in the same positions when he walked over again?

A Basically. It was in a group.

Q Did you hear any of the conversation?

A No, I did not.

Q How long did Mr. Vernon spend with Mr. Payden at this time?

A Approximately a minute or two.

Q And again he was with a group of people?

A Excuse me?

Q And again they were with a group of people?

A No, I observed Billy Vernon and Donald Payden engage in a conversation. From my observation I did not see anyone else enter the conversation but Billy Vernon and Payden.

Q You were seated in the car, correct?

A Yes, I was.

Q Across the street?

A Across the street.

Q And you were some what, 30 or 40 feet from this group of people?

A Yes, I would say that.

Q Excuse me?

A Yes, you can say that, across the street.

Q Were you parked directly across from 356-1/2?

A I was double-parked.

Q Were there cars parked on the north side of 145th Street?

A Yes, but they wasn't double-parked.

Q There was one line of cars parked along the curb, right?

A Yes.

Q And you never got out of the car to make these observations?

A I didn't have to.

Q That is not my question.

Your Honor, I direct the witness to answer my question.

THE COURT: Answer the question.

A No.

Q You never got out of your car, correct?

A Correct.

Q You were just seated behind your wheel looking across the street?

A Yes.

Q Directly across the street was a group of people as well?

A Correct.

Q Is that right?

A Correct.

Q After you saw, you say, Billy Vernon walk across the street, where did you see him go?

A Directly across the street and engaged Payden in that conversation.

Q After you saw him walk across the street?

A After I seen him walk across the street?

Q Yes, after the second conversation, as you call it.

A He walked back over to where I was at.

Q And he had another conversation with you?

A Yes.

Q And at this time this John Law was still seated in the back of your car?

A Yes.

Q And you were behind the driver's seat?

A Correct.

Q After the second conversation with you, where did Mr. Vernon go?

A Inside the club.

Q At the time he entered the club where was Donald Payden?

A When Vernon entered the club, Payden was just about starting to walk across the street.

Q Is there a door to this club?

A Yes, there is.

Q Did you see Mr. Vernon open this door?

A No.

Q Did you see it opened for him?

A Yes, I did.

Q At the time you saw this door opened for him, where was Donald Payden?

A Still on the other side of the street.

Q Still with the group of men?

A Correct.

Q Was he talking with this group of men?

A I couldn't say for sure.

Q But you can say for sure that Mr. Vernon talked with Donald Payden?

A Yes.

Q And during your observation when you were seated behind the wheel of this car, is it your testimony that you at no time saw Donald Payden in conversation with anyone else besides Billy Vernon?

MR. MacBETH: Objection.

THE COURT: No, I will permit it.

A I cannot recall if he was in conversation with a particular person when Billy entered the club.

Q Excuse me? You cannot recall, is that your testimony?

A I cannot recall who he was in conversation with if he was in conversation with anyone at the particular time Vernon entered the club.

Q So your testimony is, you don't even recall whether or not he was in conversation with anybody; is that your testimony?

A Yes, you could say that.

Q For how long a period was Donald Payden on the other side of the street, or across from 356-1/2 145th Street?

A At what point?

Q From the time you first saw him until the time you say he walked across the street to the club.

A I would say between five and seven minutes.

Q At the time Donald Payden walked across the street, Billy Vernon had already entered the club?

A Correct.

Q And would it be fair to state from that point on, after Donald Payden entered the club, that you never saw Donald Payden and Billy Vernon together that day?

A Well, Payden entered the club;a few minutes passed and Vernon exited the club.

MR. GOLDBERG: Your Honor, I direct the witness answer the question--I ask the Court to direct the witness to answer.

THE COURT: Do you want the question reread?

THE WITNESS: Yes.

(Question read.)

A Correct.

Q That's correct.

From your position in that vicinity that evening,

did you at any time see Donald Payden hand Billy Vernon any narcotics?

A No.

Q Did you ever see on that day at any time Billy Vernon give Donald Payden any money?

A No.

Q Did you give Donald Payden any money?

A No, I did not.

Q Did you receive any narcotics from Donald Payden?

A No.

Q Did you overhear through any source whatsoever any conversation that day between Donald Payden, Billy Vernon, with the subject matter being narcotics?

A No.

Q Would it be fair to say that the only information you had that day relative to Mr. Payden's being involved in narcotics is information you say you obtained from Billy Vernon?

A Correct.

Q Was it a duty of the members of the surveillance team or the backup team to watch you, keep an eye on you that day?

A Yes.

Q Did you at any time attempt to lose your surveill-

ance team in traffic?

A No.

Q Did there come a time, from looking at the reports, that in fact your surveillance team lost sight of your vehicle?

MR. MacBETH: Objection.

THE COURT: No, I will permit it.

A I don't think anything reflects to that in my report.

Q Excuse me?

A I don't think anything reflects to that in my report.

Q I'm not talking about your report. I am talking about any reports you have seen.

MR. MacBETH: Objection.

THE COURT: I will sustain the objection, yes.

Q I show you this document and ask you whether or not that refreshes your recollection as to how and under what circumstances Donald Payden, [illegible] Country's name was mentioned that night?

MR. MacBETH: May we have the document identified, your Honor?

THE COURT: Yes.

First of all, we'll have your other notes that

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you referred to before marked.

(Defendant Payden Exhibits A and B marked for identification.)

MR. MacBETH: Can we also have the record reflect the document that was shown to the witness and marked as 3515, your Honor.

THE COURT: All right. And there hasn't been any statement as required by the rule to the effect, Mr. Goldberg, that you are now examining this witness with respect to documents that were presented to you voluntarily by the Government before this witness took the stand, as required by law.

MR. GOLDBERG: Correct.

Q Does that document refresh your recollection as to how the name Donald Payden, or Country, as you call him, was first mentioned, under what circumstances that night?

A Can you repeat the question, please?

Q Does that document you have in your hand--

A This is not a document. This is a SCT confidential informant's statement made by the informant. It's not an official document.

THE COURT: First of all, do you need your recollection refreshed as to how the name Country was mentioned that night?

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THE WITNESS: No, I don't.

THE COURT: All right. Then why is he looking at any document?

Q Isn't it a fact that the name Country was mentioned, according to that document, before anybody was seen?

THE COURT: Sustained.

Q Did you say yesterday that according to what you learned from a conversation from Billy Vernon, that Donald Payden had no narcotics that night?

A On him. But that one of his lieutenants--

THE COURT: No, that is enough.

Q Who mentioned the word "lieutenant"? You mentioned that yesterday.

A Vernon.

Q Vernon mentioned the word "lieutenant"?

A Lieutenant and "man."

Q Does that word appear anywhere on your reports?

A Which word, "lieutenant"?

Q Yes.

A No.

Q At the time while on 145th Street was any price mentioned there?

A Yes, there was.

Q What was it?

A It was $800.

Q $800 for what?

A For two halves.

Q That is two half ounces?

A Correct.

Q That was supposed to be the rocky substance that you--

A No, it was supposed to be cocaine.

Q In other words, you weren't going to get the rocky substance that you had anticipated?

MR. MacBETH: Objection.

THE COURT: No, I will permit it.

A I didn't know what I was going to get.

Q Excuse me?

A I didn't know what I would receive from Billy Vernon.

Q And you didn't know who you were going to receive it from; isn't that correct?

A No, I knew I was going to receive it from Billy Vernon.

Q Earlier in the evening you thought you were going to receive it from somebody else; isn't that correct?

A No.

Q Weren't you going up to 155th Street or 150th Street for some reason?

A Yes.

Q And was there ever an occasion that a person you were to meet up there would be Country or Billy, or Donald Payden?

A There was no indication of who I was going to meet up there.

Q Weren't you going to get some Cuban cocaine or meet some Cubans and get some cocaine from them?

A Yes, but I didn't know who I was going to meet.

Q Does Mr. Payden look Cuban?

A No, he doesn't hardly look Cuban.

Q As it turned out, you didn't receive any narcotics from the Cubans; isn't that correct, that night?

A That's correct.

Q As it further turned out, you didn't receive physically any narcotics from Donald Payden, physically?

A Not physically.

Q But it is your testimony that you received narcotics from another person altogether?

A Billy Vernon.

Q I'm not talking about that. You are saying indirectly from another person, another source?

A No. It was Country's source. Vernon stated to me that Country's man, it was still Country's cocaine, and that Country didn't have any cocaine on him at the particular time, and that Country's man had something, and that the cocaine belonged to Country. It's just that his lieutenant or his man was dealing this particular ounce.

Q That is what Billy Vernon said?

A Yes, that is what he stated.

Q After Billy Vernon came out of 356-1/2 145th Street, he got into your car?

A Correct.

Q What did you do at that point?

A I drove off.

Q With him and the confidential informer?

A Correct.

Q Where did you go?

A To 140th Street and Eighth Avenue.

Q What happened at that location?

A At that location the confidential informant left the car. He entered a store. I examined the contents of the two tinfoil packages which I received from Billy Vernon. I had a conversation with Billy Vernon at this time.

The confidential informant came back into the car. I then proceeded to 116th Street and Lenox Avenue,

at which time Billy Vernon left the car.

Q Was the confidential informer, or John Law, wired that day?

A No, he was not.

MR. MacBETH: Objection, your Honor.

THE COURT: Yes, sustained.

Q Do you know of your own knowledge whether or not the informer wore a Kel transmitter or Nagra tape recorder?

MR. MacBETH: I object.

THE COURT: No, I will permit it.

A To my knowledge, he didn't have one. He wasn't wearing one.

Q When was the next time after August 6th, after you saw Mr. Payden walk into 356-1/2 145th Street that day that you had occasion to see him again?

A August 27th.

Q Three weeks or so later. You at that time bought the cocaine to the laboratory?

MR. MacBETH: Objection. Can we have a time?

Q I will withdraw the question.

Have you seen the laboratory report?

A Yes.

Q From the first buy you say you made?

A I believe so, yes.

Q Do you know whether or not it close to an ounce, or was an ounce all told?

MR. MacBETH: Objection.

THE COURT: No, I will permit it.

A I believe it was an ounce and it was good quality cocaine.

Q You had no argument with either the quality or quantity?

A Correct.

Q Do you know the difference between a gram and a grain?

A A gram and a grain?

Q Yes.

A Yes.

Q What is the difference?

A So many grams equal a grain.

Q Excuse me?

A So many grams equal a grain in weight. I don't know exactly how much weight.

Q So much grams equal a grain?

A Yes. I don't know exactly the weight.

Q Would you know how many grains there are in an ounce?

A Approximately 27 point something grains.

Q 27 point something grains in an ounce.

Do you know how many grams there are in an ounce?

A No, I have no idea.

(Continued on page 126.)

T5 Q Did you take any courses where you had to estimate the quantity of the drug?

A Estimate?

Q Yes.

A It is hard to estimate.

Q On a later occasion in connection with this investigation, didn't you at one time indicate you were short a particular buy?

A It was after it was weighed. I could distinguish between an ounce and two ounces. I could distinguish between two ounces and four ounces or three ounces. I can make approximate fair accurate view of it.

Q On this day and in connection with the later buy where you measured on the scale, could you upon observation detect any difference in the quantity?

A In the quantity?

Q The amount of the substance?

A It looked to be 2 ounces.

Q On August 27th, the next time you saw Mr. Payden, where was Payden at that time?

A In front of the Big Track Social Club, 356-1/2.

Q Big Track Social Club?

A Yes.

Q You on that day entered that social club?

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A Yes, I did.

Q As a matter of fact you saw some people in there which you described yesterday?

A Yes.

Q When you entered that club, how many people were in there?

A Approximately 20 to 25 people.

Q How big an area would you say that club was, from your observation?

A They had one room with a table approximately that size that the defendants are sitting at.

Q You described yesterday a bar--

THE COURT: Let him finish the answer.

A The area where the bar was was approximately 25 foot by 25 foot.

Q The size of the room?

A Right. It had a foyer area. It had an area as soon as you walk in, you walk straight. The bathroom was situated back there. There was another room back there. I believe, although I am not sure, I believe there was an upstairs to this social club.

Q You described a hallway area.

A A hallway area.

Q Is that the area that you talked about when you

said vestibule?

A No. I was talking about the front area.

Q After you have gone into a second door?

A Right.

Q You described the bar area, right, 25 by 25?

A Yes.

Q How many people were in this bar area?

A Approximately five.

Q Then you described some people playing cards.

A Shooting dice.

Q That was in another room?

A Yes.

Q How many people were shooting dice?

A Approximately 15 people standing around the dice table.

Q Is that a separate room where they were shooting dice?

A Yes. It was a separate room but if you were seated in the foyer area, you could observe both rooms.

Q How many people were in the foyer area?

A Myself and Vernon.

Q That is all?

A That is all.

Q Was there anybody at the second door?

A The second door?

Q The seco d door.

A You mea.. the second door before you enter the place?

Q The second door after you enter.

A I couldn't see. It is like around the corner from the two rooms.

Q Were there other rooms there that you didn't walk into that you saw doors to?

A It was a bathroom and another room, I believe it was.

Q And you said there may have been rooms upstairs?

A Yes. There could have been.

Q Did you ever go upstairs?

A No, I just assumed they had a room upstairs because they had a TV camera which they were monitoring. They had a TV camera in the gambling room and they had a TV camera by the second locked door.

Q When you say monitoring, did you see any screens?

A Screens?

Q TV screens.

A I seen a TV camera mounted on the wall.

MR. GOLDBERG: May I ask the court to direct the witness to answer my question.

THE COURT: Did you see any screens?

THE WITNESS: No.

Q You don't know that you were being monitored?

A I seen a closed circuit TV camera mounted on the wall.

Q You didn't see a screen?

A No screen, no.

Q How long were you in this club?

A Approximately 15 to 20 minutes.

Q While you were in this club, did you talk to anybody else besides Billy Vernon?

A I talked to the barmaid.

Q You ordered a drink, is that correct?

A That is right.

Q Anybody else besides the barmaid?

A I remember speaking to someone about it but it was just like a hello, something like that.

Q Were any people exiting and entering this club while you were in there?

A One or two people.

Q You say first you tried to get in, they stopped you because you had a gun?

A They searched me.

Q And found a gun?

A Yes.

Q What did that person say to you when he found the gun?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Were you told you could check the gun?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Where was your car when you say you had to take your gun and put it in the trunk, was it?

A Yes.

Q Where was your car?

A In front of the club.

Q Was it parked along the curb or double parked?

A It was double parked.

Q After someone discovered the gun, you got in your car and drove away?

A I drove around the block and met with my surveillance officers.

Q Did you drive away from 356-1/2?

A Yes, I did.

Q And you said you met with a surveillance officer?

A Yes.

Q Who was that?

A Police Officer Harrington and Detective Carlson.

Q Was this prearranged that you would meet with them?

A No, this was not prearranged.

Q How did it come that you met them?

A It was obvious that they did observe me exit the club, enter my car and drive away. They met me a block or a block and a half down. I told them I was putting my gun in the trunk and that I would return to the club.

Q When you left the club, did you see their car?

A No, I didn't.

Q They were on the block?

A I don't know where they were. I remember driving away around the corner and that is when I observed the surveillance officer.

Q Did you have to tell them that you were putting your gun in the trunk?

A Did I have to tell them?

Q Yes.

A No, I didn't have to tell them.

Q You could have placed the gun in the trunk while your car was double parked in front of 356-1/2?

A Not really. I could have but I didn't want anyone else to see me that I was putting a gun in the trunk out of fear that my gun would possibly get stolen.

Q When you came back, where did you park?

A I parked on Edgecomb Avenue facing south approximately 50 feet off of 145th Street.

Q To the time you actually gained entrance into the club, did you have any conversation with Donald Payden?

A No, I didn't.

Q Before you entered the club?

A No.

Q Did you at any time see before you entered the club Donald Payden give, hand or tender narcotics to anyone?

A No, I did not.

Q Before you entered the club, did you overhear any conversation between Mr. Payden and anyone else pertaining to narcotics?

A No.

Q Again, you only saw him, is that correct?

A I observed Donald Payden and Billy Vernon in a conversation.

Q You saw them?

A In a conversation.

Q Did you hear the conversation?

A No, I did not. I observed their lips moving.

Q But you never at any time heard any conversation?

A No, I did not.

THE COURT: He didn't hear the conversation. Next question.

Q On that day, you had originally wanted to purchase some Cuban cocaine, August 27th, is that correct?

A I don't remember.

Q Didn't you testify yesterday that it was your desire to purchase some cocaine from some Cubans?

A Yes.

Q But you didn't purchase any cocaine from the Cubans after all?

A That is because he couldn't find him.

MR. GOLDBERG: Your Honor --

THE COURT: The answer is no?

THE WITNESS: No.

Q How many bars did you go to?

A Two, in a two-block area.

Q One was the Oasis and the other was the Gallery?

A Right.

Q And you didn't wait or ask Mr. Vernon to be patient or perhaps stick around and come back to these bars; is that your testimony?

A No. After he visited both bars, he said the guy wasn't there, do you want to go back to Country. I told him

yes, I did.

Personally I didn't want to go back to Country at this time because I was trying to meet other people but at this particular point I didn't meet the Cubans. I decided to go back to Country for another purchase.

Q Did you on any other date go back to the Cubans?

MR. MacBETH: Objection.

Q In connection with this investigation.

THE COURT: I will permit it.

A There was talk of going back.

THE COURT: Did you go back?

Q Did you go back?

A No.

Q When you saw Donald Payden on August 27h, where was he physically?

A In front of 356-1/2.

Q This time he was directly in front of the club?

A Yes, he was.

Q Was anybody in front of the club with him at that time?

A No.

Q He was alone?

A Yes.

Q When you say in front of the club, was he in

front of the door, near the door, can you describe it?

A In front of the door. I would say by the doorknob, if you were standing by the door. A little further over by the doorknob.

Q And there was somebody by the club who worked for the club also near that door?

A He was on the other side of the door.

Q Where?

A Inside. Donald Payden was outside.

Q In other words, you had to knock?

A Ring a bell.

Q In order to see that person?

A Yes.

Q Where did you park your car on this occasion?

A In front of the club.

Q On the south side of the street?

A Yes, the south side.

Q And no one was with you when Billy Vernon left the car this time?

A Correct.

Q Again you saw Mr. Vernon go over to Mr. Payden?

A Correct.

Q And again they had a conversation?

A Correct.

Q Just after that -- incidentally, how long was this conversation?

A A few minutes, two or three minutes.

Q And Vernon came back to you?

A Yes. Donald Payden and Vernon entered the club.

Q How much time transpired from the time you saw them enter until the time you saw either one of them again?

A Approximately 20 minutes Vernon came back outside. He told me to come in the club.

MR. GOLDBERG: Your Honor, my question was time.

Q An hour?

A Correct.

Q And you had another conversation with Mr. Vernon?

A Yes.

Q And you and Mr. Vernon attempted to enter the club together?

A Correct.

Q Was Mr. Vernon with you when you were discovered to have a gun on you?

A Yes, he was.

Q Did he walk in the club?

A No. He stayed there while the guy refused to admit me.

Q Did he say anything to you?

A When I left -- he said when you come back, meet me in the club.

Q Did you tell him what you were going to do with your gun?

A Yes.

Q What did you tell him you were going to do?

A I told him I was going to put it outside.

Q Outside?

A I didn't say in my car. I told him I was going to bring the gun outside.

Q Was this the door that is on the street at which you were stopped?

A This is the metal door on the street.

Q So at that time Mr. Vernon could see your automobile?

A No.

Q Didn't you say your automobile was parked--

A The door was shut.

Q So he stayed in and you left, you opened the door and left?

A The doorman opened the door and I left.

Q When you finally entered the club, when you entered it where was Mr. Vernon?

A He was seated in the vestibule. At the point he was

sitting at he could observe--

MR. GOLDBERG: Your Honor --

THE COURT: Where was he?

THE WITNESS: In the vestibule.

Q Were there any other individuals with him?

A No, there wasn't.

Q He was sitting there by himself?

A Yes.

Q Did you walk over to him?

A Yes, I did.

Q Did you have a conversation?

A Yes, I did.

Q After that conversation with him, did you or he go somewheres?

A Yes. We left the club with Donald Payden.

Q Didn't you tell us you were in the club 20 minutes or so?

A Approximately 20 minutes.

Q How long after you had entered the club did you see Donald Payden for the first time?

A Approximately 15 minutes.

Q Do you know where it was that you saw him? Do you know where he was coming from, what room he was in?

A He was coming from the back somewhere. There were

other rooms back there. I couldn't tell you exactly what room he was coming out of but he was coming from the back.

Q So there were other rooms besides the bar?

A There was a bathroom and I believe one other room on the same level and I also believe there was a room on top of the club upstairs.

Q Is it your testimony that Donald Payden walked over to you and Mr. Vernon?

A No. He called to Vernon. Myself and Vernon then met with Donald Payden.

Q How did he call him?

A "Hey Billy, come on." Billy said let's go and we got up and met with Donald Payden. I exchanged greetings with Donald Payden by a nod of the head. We exited the club together. Outside of the club Donald Payden and Vernon walked approximately ten feet away from me in a west direction, west of the club. I stood in front of the club. Vernon turned to me and me and Vernon walked a couple of feet east and then engaged with Vernon in conversation at which time I gave Vernon $400.

MR. GOLDBERG: Your Honor--

THE COURT: Next question.

Q Didn't you tell us yesterday that somebody told you that Donald Payden didn't want to deal outside or in the

light?

A Vernon stated to me Donald Payden didn't want to sell any cocaine, it was too light outside.

Q Didn't you go outside?

A Yes, we did.

Q What time was it that youwent outside?

A It was about something after 7.

Q It was still light outside?

A It was turning dark. Dusk. It was getting ready to turn into darkness.

Q This is 7 o'clock on August 27th?

A 7:15, 7:30, around that time.

Q How would you characterize the lighting inside this club, light or dark?

A The gambling room was. The bar wasn't lit too good. All the rest of the club wasn't lit too good, from what I observed.

Q And when you say you exchanged a greeting with Mr. Payden, was this greeting which you had the only visual communication you ever had with Mr. Payden?

MR. MacBETH: Objection.

THE COURT: I will permit it.

Did you talk to him on that occasion or just nod your head?

THE WITNESS: Just a nod.

THE COURT: No words were exchanged?

THE WITNESS: No.

Q So far as you can recollect, no words were ever exchanged between you and Donald Payden?

A You could say that.

Q Excuse me?

A You could say that.

Q It is not for me to say. Can you say that?

A I would say there were no words used.

Q And your testimony was that you saw Mr. Vernon and Mr. Payden enter an automobile, is that correct?

A A 1973 two-door, two-seated Mercedes-Benz.

MR. GOLDBERG: Your Honor, I ask the court to direct this witness--

THE COURT: I will permit it. Next question.

Q Is that the last time you saw Mr. Payden on August 27, 1974?

A Yes.

Q How long after that,after you saw Mr. Payden and Mr. Vernon as you say enter an automobile, did you have occasion to see Mr. Vernon again?

A Approximately an hour later, a little more than an hour. An hour and 15 minutes later.

Q Do you know of your own knowledge where Mr. Vernon was for that hour period?

A To my knowledge, he was with Donald Payden.

Q Where was he physically?

A Manhattan and/or the Bronx.

Q Do you have any way of knowing that?

A I was not familiar with where Payden lived.

Q Do you have any way of knowing that?

A No.

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Q Is your statement a moment ago that Manhattan or the Bronx, from the fact that you knew where Payden lived?

A Yes, I knew where Payden lived.

Q Is that the reason why you thought he lived in the Bronx?

A He went to his house or to his connection's house, which Vernon stated that he had a Cuban connection somewhere on 96th Street in the vicinity of Riverside Drive. I assumed that he was going to one or either one of these locations.

Q You assume; do you know?

A I say, I assumed.

Q Let me ask you this: Did Billy Vernon at any time tell you where he is going with Donald Payden?

A Not at that time.

Q Do you know whether or not there were any surveillance cars in the area that were watching that area on 145th Street?

MR. MacBETH: Object.

THE COURT: No, I will permit.

A Yes, there were surveillance cars.

Q Do you know whether or not officers attempted to tail?

A Yes, they did.

Q That car?

A Yes, they did.

Q And do you know what happened?

MR. MacBETH: Objection, your Honor.

THE COURT: Yes, sustained.

Q Isn't it a fact that the officers said they lost sight of that car somehow?

MR. MacBETH: Objection.

THE COURT: Sustained. The jury will not infer anything by reason of asking a question. I told you that before. Next question.

Q Did you, when you left the area at that point, converse at any time with your fellow officers?

A Yes, I did.

Q And did you impart to them information which might help them find Donald Payden and Billy Vernon?

A I might have.

Q Is that your answer, you might have?

A I might have told them that he might be headed towards the Bronx. I can't say for positive that I told him that, but it's a possibility I did tell him that.

Q When you left 356-1/2 you were alone at that point; is that right, on August 27th?

A Yes, I was.

Q And you knew there was a chain in the area, your crew, right?

A Correct.

Q Your group and you are telling this court that you had some information that would lead you to believe where they might go?

A That's correct. It was a theory I had.

Q What was that?

A It was a theory I had.

Q Did you impart to these police officers, did you tell these nine other officers or any of these officers about your theory?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Did you tell them where Mr. Payden or Mr. Vernon might be found or where they might be going?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Do you know of your own knowledge how long Mr. Payden and Mr. Vernon spent with each other during this, you say hiatus of one hour between the time you saw them enter a car and you again saw Mr. Vernon, as you testified?

A Vernon stated to me that him and Country--

THE COURT: You wouldn't have any way of knowing,

would you?

THE WITNESS: No.

THE COURT: You didn't see him?

THE WITNESS: No.

Q For all intents and purposes --

THE COURT: Sustained.

Q Would Mr. Vernon have been dropped off around the corner?

MR. MacBETH: Objection.

THE COURT: Sustained. He says he didn't see them from the time he left; is that correct?

THE WITNESS: Correct.

THE COURT: All right. Next question.

Q Was that the last time in connection with this investigation, the time that you saw Mr. Payden enter that car, was that the last time you saw him in connection with this investigation?

A In connection with it? I observed him one other time.

Q Excuse me?

A I observed him one other time.

Q When was that?

A I can't recall the date. I was passing by 145th Street and I observed Mr. Payden in the vicinity of 356-1/2.

Q In other words, on the sidewalk again?

A Yes.

Q But nothing transpired at that particular time?

A There was no -- I wasn't actively involved in an investigation on that particular day when I observed Donald Payden.

Q It was just coincidence?

A Coincidence, right.

Q And on October 23rd you never saw Donald Payden?

A No.

Q So all told --

A But I did observe the 1973 Mercedes-Benz that day.

MR. GOLDBERG: Your Honor, I move to strike that.

THE COURT: Yes, it's stricken. The jury will disregard it. Next question.

Q All told, Officer, how many minutes in the months of August, September and October did you actually observe, see in front of you, Donald Payden?

A How many minutes in the three-month period of time?

10 to 15 minutes, I would say.

Q 10 to 15 minutes?

A The most 20.

Q Except for the acknowledgment, you had no communication with him during this three-month period?

A Excuse me?

Q Except for the acknowledgment, when you say he shook your hand or acknowledged your presence, that was the extent of your direct communication with Mr. Payden?

A Yes.

Q At no time during this period did you see him with any money?

A With any money?

Q Any money.

A No.

Q At no time during this period did you see him with any drugs?

A No.

Q Did Mr. Vernon at any time tell you that the Cuban people were his connection?

A He told me he had a few connections.

MR. GOLDBERG: Your Honor, I again ask the court to direct the witness to answer my question.

THE COURT: I think you phrased it in such a way that is the only answer called for. I will permit it.

I believe the way you phrased it and the way your tone of voice was, I think that his answer was responsive.

Q I will repeat the question: At any time did Billy Vernon indicate to you that the Cuban people were his

connection or a connection of his?

A He indicated to me tht he had many connections.

Q Did he indicate the people in those two bars or that he was looking for in the Oasis and the Gallery were other connections?

A Yes. He mentioned his name. There was an active investigation going on that particular person by Group 9. I believe his name was Frankie.

Q That was another connection?

A No. That was his Cuban connection. Like I say, he had many connections.

Q Would a purchaser of cocaine be more likely to pay a high price if he were told that the quality was good?

A Excuse me?

Q Would the purchaser of cocaine be more inclined to pay a higher price if that purchaser were told that the quality of the cocaine was good?

A That was a lengthy question. Could you possibly repeat that again please?

MR. GOLDBERG: Would you read the question?

(Question read.)

A Depends who you was getting it from. If he had a good connection you would pay 8, 9 hundred dollars for. If you had a bad connection, you could pay up to 14, $1500 for it. From whom you dealt with.

Q If I were the seller of narcotics and I told you, Officer Jackson, that I had a very good connection and I could get good quality stuff, would you be inclined to give me more money?

A Would I be inclined to give you more money? I would have to negotiate with you on the price.

Q Assuming we negotiated and we discussed it, and I said this is the highest quality, it has rocks, it's from Cuba--the best source in the world; would I be inclined to pay a higher price?

MR. MacBETH: I object.

THE COURT: Sustained.

Q You have worked in the street; isn't that correct?

A Yes.

Q Didn't people brag about the drugs they have and say it's the highest quality?

THE COURT: Sustained.

Q Are you telling us then that my statement to you that I had good quality stuff wouldn't affect the amount of money you paid for it?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Did you ever snort at cocaine?

A No.

MR. MacBETH: Objection, your Honor.

THE COURT: He already answered no.

Q On the couple of occasions that you mentioned the other day, you said that you were asked by various people to test the cocaine and check it out; I believe is the word you used.

A I would say on the majority of my buys I was asked.

Q You are telling us here that you were asked to check it out, by certain people?

A Yes.

Q And yet you chose not to check it out?

A Correct.

Q When they say check it out, they meant sniffing it?

A Correct.

You can check it out in different methods.

THE COURT: There is no question before you.

Q Do you know how many autos were used by your team, your group, if you know, on August 27th?

MR. MacBETH: Objection, your Honor.

THE COURT: No, I will permit it.

A If I can look at my reports I could tell you approximately.

Approximately four. I would say maybe four, five.

MR. GOLDBERG: May I have a moment, your Honor.

(Pause.)

Q Did this individual named John Law ever mention the name Country or Donald Payden?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Did you ever at any time after you received the contraband, the cocaine, have a fingerprint analysis done of the fingerprints on the plastic bags or the tinfoil packets?

A No.

Q Is there a facility with either the New York City Police Department or the Task Force to get fingerprint information?

A It's very hard lifting prints from a plastic bag or tinfoil.

Q When you say very hard--

A Very hard, very difficult to lift a print from a plastic bag or tinfoil. I am handling the bag, I might be rubbing the prints off. There is different reasons why we don't bring it to the lab and have this done. There is many reasons.

Q But they have a fingerprint laboratory in New York City?

A Yes, I would say the Police Department has one. I would say the Federal Government has one.

Q Excuse me?

A I would say the Police Department has one, I would say the Federal Government has one.

Q You are saying that it is difficult to take fingerprints off the plastic or off of a tinfoil packet?

A A plastic bag or tinfoil.

Q Or tinfoil package?

A Right.

Q Are you saying it is impossible?

A No, I'm not saying it is impossible. I'm saying it would be a very hard thing to do to get a good print or a clear print.

Q What you are saying is, it might have been smudged by somebody touching it?

MR. MacBETH: Objection.

THE COURT: Let the witness testify.

A It could have been smudged by me.

Q Is your reason why--

A That is not the only reason. A plastic bag is wrinkled, it's very hard getting a good print off of it.

Q Are you familiar with the book published by the Federal Bureau of Investigation of the United States Department of Justice called "The Science of Fingerprints"?

A No, I am not.

Q Have you ever looked at this book?

MR. MacBETH: Objection.

THE COURT: He is not familiar with it. That is the end of it.

Q Would you consider the FBI to be an authority on fingerprints?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q What you are saying to us, officer, is that you didn't choose to bring the plastic bag--

MR. MacBETH: Objection.

THE COURT: Sustained.

MR. GOLDBERG: May I complete my question, your Honor?

THE COURT: No, because the form is already poor.

Q Did you take on any occasion during this investigation any contraband or any of the containers that held the contraband for fingerprint analysis?

MR. MacBETH: Objection.

THE COURT: No, I will permit that.

A No.

Q Were any photographs taken of Mr. Payden and Mr. Vernon at any time together?

A During this operation I don't think any photographs were taken.

Q My question to you--

THE COURT: He said no photographs were taken during that operation. That covers it.

Q Do you know who was responsible for the fact that no photographs were taken?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Mr. Jackson, aside from what you say Mr. Vernon told you, is there any evidence whatsoever that indicates Donald Payden was selling drugs to you during the months of August, September and October of 1974?

MR. MacBETH: Objection.

THE COURT: Sustained.

MR. GOLDBERG: No further questions.

THE COURT: We will take our morning recess. We have gone a little longer than usual, but we will take it now.

Don't discuss the case.

(The jury left the courtroom.)

THE COURT: Anybody want to bring anything up?

MR. MEYERS: Your Honor, I would like to examine Mr. Jackson.

THE COURT: He is not excused.

MR. MEYERS: Is he remaining here?

THE COURT: Yes. He hasn't been redirected and recrossed. I just wond[illegible]ed if there is anything to be brought up in connection with any rulings that have been made. I give you that opportunity every recess.

Hearing none, I assume there are none.

(Recess.)

7A. B1

XXX

(In open Court - jury present.)

REDIRECT EXAMINATION

BY MR. MacBETH:

Q Mr. Jackson, you made a purchase of cocaine on the 6th of August, is that correct?

A Yes, I did.

Q In relation to that purchase, you filled out a daily activity sheet and a DEA 6 form?

A Yes, sir.

Q On the 27th of August, you made a purchase of cocaine, is that correct?

A Yes.

Q In relation to that purchase, you made out a daily activity sheet and a DEA 6 form?

A Correct.

Q On October 3rd, you made another purchase of cocaine and in relation to that purchase you filled out a DEA 6 form and a daily activity sheet, is that correct?

A That is correct.

Q On October 23rd, you did not make a purchase of cocaine?

A That is correct.

Q In relation to that, you filled out only a daily activity sheet?

A That is correct.

Q On August 27th, is it true that you were frisked when you first entered the club at 356-1/2 West 145th Street?

A Yes, three times.

Q Was that a thorough frisking?

A Yes, it was.

Q If you had had on your person at that time a Kel transmitter--

MR. GOLDBERG: Objection.

THE COURT: Sustained.

Q Would you describe to the jury the thoroughness--

THE COURT: Is a Kel transmitter larger than the pistol you had?

THE WITNESS: No.

THE COURT: How do they compare in size?

THE WITNESS: A pistol is about twice the size of a Kel.

Q Would you describe to the jury the thoroughness of the frisking that you received?

A I was frisked from the shoulders down around my back down to my legs, in between my legs, around my waist. He frisked me twice around my waist which he didn't find anything. The third time the doorman hit me underneath

my buckle and he knew--

MR. GOLDBERG: Objection.

THE COURT: Sustained.

A He looked at me and smiled. I informed him I had the pistol. The only reason I had it was for my protection because I was carrying a large sum of money.

Q What is the size of a Nagra tape recorder?

A It is approximately six inches long, about an inch in thickness and approximately six inches wide.

Q How does that compare in size to the pistol you were carrying on the 27th of October?

A It is much larger than the pistol.

MR. MacBETH: No further questions.

MR. MEYERS: May I proceed?

THE COURT: Only in connection with the matters brought out by Mr. Goldberg's cross examination.

MR. MEYERS: I raise a question yesterday as a defense and I think at this point now I should be permitted to go into those questions.

THE COURT: I thought I held you weren't entitled to go into it.

MR. MEYERS: I was going in a certain direction and stopped there on the assumption I would be permitted to interrogate.

THE COURT: After the jury had retired we discussed it and I adhered to my original ruling.

MR. MEYERS: I don't know whether or not your Honor has ruled on that.

THE COURT: Yes, I have.

MR. MEYERS: Without trying to duplicate.

RECROSS EXAMINATION

BY MR. MEYERS:

Q Agent Jackson, going to back to the incident of August 6, 1974, you did submit a report? You prepared a report on that, did you not?

A Yes, I did.

Q And that report, I take it, was prepared from a memorandum you had taken after the incident occurred?

A Yes.

Q To the best of your recollection, approximately how soon after the incident occurred did you make this memorandum?

A Immediately after I returned to the office I wrote out on a scrap piece of paper pertinent information which I received on that day.

Q Was that in a permanent book form or on sheets?

A On a scrap piece of paper.

Q Those sheets, I understand, or the original

memoranda were destroyed by you pursuant to a direction or a customary procedure in the department?

A The scrap paper was destroyed after I transferred all the facts and the pertinent information on a full report.

Q How soon after the incident occurred would you say that the report that you prepared for the August 6, 1974 incident was prepared, approximately?

A Approximately one day.

Q You quoted in your report of August 6, 1974 a purported conversation that you say you had with Mr. Vernon, is that right?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Did your report contain a verbatim statement of the conversation or is it merely a summary to the best of your recollection?

MR. MacBETH: Objection.

THE COURT: Sustained. You are referring to something not in evidence.

Q Your report of August 6, 1974 indicates--

MR. MacBETH: Objection.

THE COURT: Sustained.

You can't read from a document not in evidence.

MR. MEYERS: Pardon me?

THE COURT: You cannot read from a document not in evidence.

MR. MEYERS: I am not reading from it.

THE COURT: You just said "it states."

Q On August 6, 1974, you proceeded in the company of Mr. Law, the informant, to 116th Street?

A That is correct.

(Continued on next page.)

T7B

Q When you got there, were you introduced to Mr. Vernon by Mr. Law?

A Yes, I was.

Q Is it a fact, Agent Jackson, that you were introduced to Mr. Vernon as a cousin of Mr. Law?

A No, I was not.

Q You had never met Mr. Vernon prior to that time, had you?

A No.

Q Was there no introduction at all as to who you were?

A My name was Troy. I was a cocaine dealer. I had a lot of money. I was portraying a cocaine dealer.

Q Did you give him your name?

A Yes.

Q What name did you use?

A Troy.

Q Did you tell him where you lived?

A No, I did not.

Q Did you tell him who had sent you or how you happened to be at that particular place at that particular time?

A He knew that.

Q Pardon me?

A He knew why I was there.

Q I didn't ask you that. Did you tell him?

A Tell him what?

Q And you were not introduced as the cousin of Mr. Law?

A No, I was not.

Q Did you tell him you were interested in purchasing cocaine?

A Yes, I did.

Q Did you indicate to him, of course, that the purchase of cocaine in the quantity that you saw it, that you intended to resell that cocaine?

A I left no doubt in question.

Q In other words, you didn't imply to him you intended to utilize this cocaine for your own use?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Therefore, is it a fact, Agent Jackson --

A Police officer.

Q Patrolman Jackson?

A Police officer.

THE COURT: He is a police officer.

MR. MEYERS: I wanted to promote him.

THE COURT: It is not a question of promotion or demotion. He wants to be called a police officer and

that is what he is, is that correct?

THE WITNESS: Yes.

Q Is it a fact you wanted to utilize Mr. Vernon--

MR. MacBETH: Objection.

Q Is it a fact that the purpose of your conversation with Mr. Vernon in the company of Mr. Law was to have Mr. Vernon go out and get you people who would sell the cocaine to you. No, sir.

MR. MacBETH: Objection.

THE COURT: I will permit it.

Q You were interested in buying the cocaine, weren't you?

A Excuse me?

Q You were interested in buying cocaine?

A Yes, I was.

Q I assume you knew that Mr. Vernon did not have the quantities of cocaine that you hoped to buy?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Isn't it a fact that Mr. Vernon was acting as your agent in procuring this cocaine?

MR. MacBETH: Sustained.

Q When the August 6th transaction took place, your automobile in which Mr. Law the informant was riding, they did

approach in front of 145th Street, in front of this particular bar?

A Big Track Social Club.

Q When Mr. Vernon went into the bar--

A Social club.

Q Did you give him the money for the cocaine?

A No, I did not. No, I didn't give him any money and I didn't have any cocaine to give him. If I would have given him cocaine, could have been arrested for sale.

Q Was the money transferred after he came out of the bar and delivered the package to you in the automobile?

A No. The money was given to him before he entered the social club.

Q That is what I am referring to. As he left the car, you gave him the money to go in and buy this cocaine for him, is that what you told him?

A I didn't tell him that. He asked me for the money. He said he had to go in the club to get the package and that he needed the money and he would be right out.

Q And you knew he was going into that bar to buy this cocaine for you as an accommodation?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q In your conversation with Mr. Vernon where Mr. Law

was present, didn't Mr. Law tell you or tell --

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Did you ask Mr. Vernon to get you the cocaine as a favor or a friend of Mr. Law?

A No, sir.

Q On August 6th when you left 116th Street, you proceeded to 155th Street, is that right, originally? That was the original destination?

A In the vicinity of 155th Street.

Q 155th Street and Broadway, that is where you were headed for originally?

A Yes.

Q The destination 155th Street and Broadway, you weren't told who you were going to meet there, were you?

A I was under the impression --

THE COURT: No. Were you told who you were going to meet there?

THE WITNESS: Not at particular name.

Q In other words, when you left 116th Street on the way to 155th Street, was it for the deliberate intent and purpose of meeting Mr. Payden?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Was that the objective?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Who did you expect to see at 155th Street?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Somewhere on the trip to 155th Street, the car was stopped suddenly, wasn't it?

A Stopped suddenly?

Q In other words, Mr. Law observed somebody on the sidewalk?

MR. MacBETH: Objection.

THE COURT: I will permit it. I will let you get into that but not that way.

A No, sir.

Q You never did get to 155th Street and Broadway?

A No. At 145th Street and Broadway I made a U t urn and proceeded back to 356-1/2.

Q What caused you to stop at 145th Street?

A I was directed there by Billy Vernon.

Q So that the appearance or what you say was the appearance of Mr. Payden, was purely coincidental at that time, wasn't it?

A Yes. It was a stroke of luck that he was outside that particular time.

MR. GOLDBERG: Object to that characterization.

THE COURT: I will permit it.

Q In other words, that Mr. Vernon, when you left 116th Street, intended to take you to Mr. Payden, is that right?

MR. MacBETH: Objection.

THE COURT: Sustained.

2 Q It was merely a coincidence, wasn't it, as you
3 say, a stroke of luck?
4 MR. MacBETH: Objection.
5 Q Why did you say it was a stroke of luck?
6 MR. MacBETH: Objection.
7 THE COURT: Sustained.
8 Q Now, when Mr. Vernon emerged from the bar at
9 145th Street and--
10 A Club.
11 Q Excuse me?
12 A Club on 145th Street.
13 Q What was the name of the club?
14 A The Big Track.
15 Q When he emerged from the club with the cocaine
16 or the package, he then delivered it to you in the auto-
17 mobile?
18 A Yes, he did.
19 Q And at that time did he say to you that, check
20 it out and if it doesn't prove to your satisfaction, that
21 he would "take it back"?
22 A Yes, he did.
23 Q You understood what he meant by the phraseology
24 "I will take it back," to whom?
25 MR. MacBETH: Objection.

THE COURT: Ask him, did he say to whom he would take it back? If that is the question, I will permit it.

A No, he did not name any names. It was someone in the club that he was going to take it back.

Q In other words, you knew at that point that that cocaine did not belong to him, that he had gotten it from somebody; is that right?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Did you understand, then, that if it didn't prove satisfactory to you he would take it back to somebody who was in that particular bar or night club; is that right?

MR. MacBETH: Objection.

THE COURT: No, I will permit it.

A When he said he was going to take it back, I was under the impression that he was going to return the cocaine to Donald Payden or to one of his lieutenants, which he stated that he got it from.

MR. GOLDBERG: I object to that, your Honor.

THE COURT: No, the question was asked.

Q When this transaction on August 6th was finished, did you give Mr. Vernon any gratuity?

A No, I did not.

Q For that transaction you did not?

A Correct.

Q Did you give Mr. Vernon any gratuity on the transaction that you have indicated in which one of the Bells were involved?

A Yes, I did.

Q How much did you give Mr. Vernon?

A I gave him $100.

Q Why did you give $100?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Isn't it a fact, patrolman Jackson, that you gave Mr. Vernon the $100 which you described "for the introduction"?

A Introduction--

Q Pardon me?

A One second, sir.

(Pause.)

A For an introduction or for usually when you have a person that brings you someone, you usually give him some money. People out in the street that deals in cocaine might give him a little cocaine as appreciation for getting the package for him. That is why I gave Vernon the $100, because he asked me on the second occasion that I met him, he said, I thought you was going to straighten me out.

I said well, you know, I had to check out the package first and make sure everything was on the up and up; that I did get a good package.

On August 27th I gave Vernon $50 as appreciation for getting the package for me. The same thing on October 3rd, I gave him $100.

Q Did you give him the $100 for the introduction, as you have described?

MR. MacBETH: Objection.

THE COURT: I think he stated it.

Q Did you make a report, Government's Exhibit 3515, pertaining to the October 3rd transaction?

A Did I make what form?

Q Did you make a report on the October 3rd transaction?

A Yes, I did.

Q I ask you to look at the report and see if you refresh your recollection as to whether or not you did describe the payment of the $100 as being--

MR. MacBETH: Objection, your Honor.

Q --an introduction?

THE COURT: It is improper in form but it is properly asked.

Did you describe that on that occasion as an

introduction?

THE WITNESS: Yes, I described it.

THE COURT: You described it as an introduction. All right.

Q Prior to that particular transaction, on the August 27th transaction did you give Mr. Vernon any gratuity for an introduction?

MR. MacBETH: Objection, your Honor.

THE COURT: No, I will permit it.

A For appreciation.

Q I can't hear you.

A To show that I was appreciative of Vernon getting the cocaine for me, I gave him $50. I could not give him any of the narcotics; that's why I gave him money.

Q You gave him $50 for the August 27th transaction because he had introduced me to somebody who sold you the cocaine; isn't that so?

MR. MacBETH: Objection, your Honor.

THE COURT: Sustained.

Q Was that an introduction gratuity?

MR. MacBETH: Objection, your Honor.

THE COURT: Break it down into one question.

Q What distinction was there, if any, between the $50 that you gave to Mr. Vernon on August 27th as contrasted

with the payment you gave to him on October 3rd in relation to the Bell transaction, if any?

A There is no distinction. I gave Vernon the money for the same reason, for appreciation that he got a package for me. That is the only reason I gave him the money.

Q On both of these occasions and also on the occasion of August 3rd isn't it a fact, patrolman Jackson, that you knew that he was merely introducing you to sellers?

MR. MacBETH: Objection, your Honor.

THE COURT: Yes, sustained.

Q Let's go back for a moment to Mr. Law, who was in the automobile with you on August 27, 1974. I believe yesterday you gave an explanation as to your interpretation of what a confidential informant is--

MR. MacBETH: Objection, your Honor.

THE COURT: We haven't had a question yet.

Q We know what the meaning of the words are, but from the point of view of a confidential informant in relation to narcotics transactions with the Federal Government, what are the elements, what do we mean by a confidential informant?

MR. MacBETH: Objection, your Honor.

THE COURT: Sustained.

Q Had you ever employed or to your knowledge had

the Government ever employed Mr. Law as a confidential informant prior to August--

MR. MacBETH: Objection.

Q --7th of 1974?

MR. MacBETH: Objection.

THE COURT: Sustained.

MR. MEYERS: May I approach the bench?

THE COURT: No, you may not.

MR. MEYERS: May I do it at the recess?

THE COURT: Yes, you may.

MR. MEYERS: From that standpoint, I am at a disadvantage because of--

THE COURT: No, I told you, if we have to have this witness recalled, he will be recalled.

Q What role, if any, did Mr. Law play in the August 7, 1974 transaction?

MR. MacBETH: Objection, your Honor.

THE COURT: Yes, sustained.

Q Did Mr. Law participate in the conversation that you had with Mr. Vernon?

A No, he did not.

Q On August 7, 1974?

A He participated in no narcotics conversations with myself and defendant Vernon. He did not participate

in any of the narcotics conversations.

Q Did you hear Mr. Law tell Mr. Vernon that he would greatly appreciate Mr. Vernon--

A No--

MR. MacBETH: Objection.

Q --doing you a favor by having cocaine sold to you?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Tell me, patrolman Jackson, between August 7th of 1974 and August 24th of 1974 was Mr. Vernon under surveillance at any time?

MR. MacBETH: Objection, your Honor.

THE COURT: No, I will permit it. As far as you know.

A Between what time?

THE COURT: August 6th or 7th and August 24th.

MR. MEYERS: The first occasion was August 6th.

THE COURT: August 6th and August 24th. Do you know whether he was under surveillance or not?

THE WITNESS: I have no idea.

Q During that particular period that I just described, from August 6th to August 24th of '74 did you make any further attempt to contact Mr. Vernon?

A No.

Q What were the circumstances under which you say you contacted him on August 24, 1974?

A August 24th?

Q The second occasion.

THE COURT: It is the 27th.

Q I am sorry. The 27th.

A I went up there and seen him.

Q Any conversation that ensued at that particular time, as I gather, was solely between you and Mr. Vernon; is that right?

A Yes, sir.

Q And the notes of that particular conversation and all the other details you had incorporated, as I understand it, in some memorandums, were destroyed by you; is that right?

A No, sir.

Q I mean pursuant, of course, to whatever directive you may have received in your department. I am not attributing any deliberate destroying on your part.

Am I correct in that?

MR. MacBETH: Objection.

THE COURT: Didn't you tell us that your notes were eventually used to transcribe the statement, and the

transcribed statement was reviewed by yourself and your supervisor and the notes themselves were destroyed?

THE WITNESS: Yes, after they were typed up. They were proofread--

THE COURT: Proofread and the original notes were destroyed.

THE WITNESS: Yes, sir.

Q The August 27th transaction in which you approached Mr. Vernon directly, is that right?

A That is correct.

Q Did he know that you were coming?

A He told me I could catch him up there any time.

Q Did you go seeking for him, looking for him?

A I went up in the area and met him at his usual location.

Q And you were looking for him particularly, weren't you?

A Yes. I went up there to see him.

Q How much time did you spend in searching for Mr. Vernon on that particular occasion?

A Not long.

Q Between August 6th of '74 and August 27th of 1974 had you made any similar search looking for Mr. Vernon?

A No.

Q And your meeting with Mr. Vernon on August 27, 1974 was to have him see whether he could introduce you to any purchasers--or sellers, rather, of cocaine; isn't that so?

MR. MacBETH: Objection.

THE COURT: We are back into improper recross examination, Mr. Meyers.

Q Let us revert to the transaction pertaining to Bell.

The transaction, as I understand it, at some particular point when the narcotics were turned over to you, as I understand it, by either David or Lester Bell--isn't that so--

A That's correct.

MR. MacBETH: Object to this line, your Honor.

THE COURT: I think he is putting a point of time. That's all we are getting into.

Q Did you determine that Mr. Bell had given you a narcotic which was underweight; is that right?

A Yes. After the examination of the narcotics, I weighed the narcotics and the scale indicated that the package was short of two ounces.

Q On determining that, did you and Mr. Vernon go

back to the Bell brothers or did he turn the narcotics over to you and complain about the underweight?

A I was accompanied by Mr. Vernon. I spoke with Lester Bell. Vernon didn't have any conversation with Lester Bell regarding his short package.

Q In other words, you told Mr. Bell that the cocaine that Mr. Bell had sold you was underweight; is that right?

A That's correct.

Q And the physical transfer of the cocaine took place in the apartment, you say, of Mr. Vernon?

A Yes.

Q Was there anybody else present in addition to the Bells, yourself, and Mr. Vernon?

A No. There was a female in another room, in the bedroom.

Q Somebody that you referred to as John Doe in the apartment?

A No. Billy told me that was his girl friend.

Q Is there any question, patrolman Jackson, that what you referred to as a confidential agent or confidential informer was Mr. John Law who accompanied you in that automobile?

MR. MacBETH: Objection, your Honor.

THE COURT: Sustained.

MR. MEYERS: No further questions.

THE COURT: Anything further?

MR. GOLDBERG: Just a couple, your Honor.

THE COURT: All right. But you are limited to proper recross examination now.

RECROSS EXAMINATION

BY MR. GOLDBERG:

Q Officer Jackson, when you made the decision so far as entering 356-1/2 West 145th Street, did you have any idea before you entered that club that you were going to be searched?

MR. MacBETH: Objection.

THE COURT: No, I will permit it.

A It was a possibility. A very strong possibility.

Q What made that possibility?

A Well, I am familiar with a lot of after-hours clubs uptown and most after-hours clubs uptown you do get searched very thoroughly.

Q Were you ever in 356-1/2 before that date?

A No, I was not.

Q You are saying to this Court and jury that you base that decision because you have been in after-hours clubs before?

A I base that decision because I know there are

known narcotics dealers hanging in that club; I know there are--

MR. GOLDBERG: I object to that statement as being not responsive.

THE COURT: Yes. You know it is the custom to be frisked and searched in there?

THE WITNESS: Yes.

Q You didn't have any idea that day that you were actually going to enter 356-1/2; is that correct?

A No, I didn't.

Q And you didn't wear a Kel transmitter or a Nagra recorder on August 6, 1974, did you?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Incidentally, have you looked at the lab reports in connection with the contraband of 8/6 and 8/27?

THE COURT: It is improper recross.

MR. GOLDBERG: Your Honor--

THE COURT: All that Mr. MacBeth got into was the daily activity sheets and the forms that he filled out on 8/6, 8/27 and 10/3, and not 10/23 because there was no purchase on that date. The question is whether he was frisked. That's all he got into.

MR. GOLDBERG: Mr. Meyers asked a question that

causes me to ask a question.

THE COURT: What is the question? I am not going to permit you to go back and forth.

Q You said in response to Mr. Meyers' question thatyou went to the Bells and complained about the underweight factor of that contraband on August 3rd; is that correct?

A That's correct.

Q Did you ever compare the weight of that with the contraband that you say you purchased on August 27th?

A Did I ever compare the weight?

Q The weight.

A No.

Q If I told you that the narcotics on 8/27 weighed less than the contraband on October 3rd, would you dispute that?

MR. MacBETH. Objection.

THE COURT: Sustained.

Q Did you ever make any attempt to go back to Mr. Payden and complain about being shorted?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Did you ever make any contact with Mr. Payden and attempt to speak to him?

MR. MacBETH: Objection.

THE COURT: Sustained.

MR. GOLDBERG: No further questions.

THE COURT: Anything further?

MR. MacBETH: No, your Honor.

THE COURT: You may step down.

(Witness excused.)

THE COURT: This is a very convenient time for us to break for lunch. Don't discuss the case, don't make up your mind about it. We will resume here promptly at 2:00. Have a pleasant lunch.

(The jury left the courtroom.)

THE COURT: I thought you don't need it, Mr. Meyers, but in case you wish to look at it, I have here, I think the latest Court of Appeals decision in connection with entrapment, the Rosner case, the so-called entrapment defense. 458 Fed Sec 1213 at page 1220. You are welcome to look at it if you want.

MR. GOLDBERG: Your Honor, before we leave the courtroom I made an application earlier this morning in which you indicated you reserved decision on with reference to the production or at least as far as I am concerned the address of the confidential informer, in that I believe under the circumstances of this case, looking at

the affidavit made out by the informant himself on August 7th he is essential for a fair determination of this case.

THE COURT: In what respect?

MR. GOLDBERG: In that there are inconsistencies between his affidavit and the testimony of officer Jackson.

THE COURT: In what respect?

MR. GOLDBERG: In A, the respect that he was an eye witness to what transpired on August 6th; that is, his statement, for one is indicative of the fact that there was no coincidental meeting between Mr. Vernon and Mr. Payden that day, but from that affidavit it appears to have been discussed on the way uptown as opposed to this officer saying it was just a stroke of luck that they ran into Donald Payden between Edgecomb and St. Nicholas.

THE COURT: What difference does it make whether it is a stroke of luck or whether it was planned?

MR. GOLDBERG: Except it affects this officer's credibility, your Honor.

THE COURT: I don't think that is a question of such great moment in this case that it requires the production of the confidential informant. What else do you have?

MR. GOLDBERG: He is a witness to the case.

THE COURT: But that doesn't make a confidental

informant producible.

MR. GOLDBERG: It was conceded--

THE COURT: If you look at proposed Rule 510 of the Federal Rules of Evidence which were rejected by Congress you will see what I think is the appropriate information where the identity of an informer is concerned. I think under the criteria set forth under that Rule 501, which I think states the law the way it is today, you haven't shown me anything that requires the production of that informant.

MR. GOLDBERG: Your Honor, since it's been conceded by the Government that in fact this individual is John Law and in fact he was the Government informer, I don't see that privilege existing any more.

MR. MacBETH: It is not a concession on the part of the Government, your Honor. As I remember what happened, the question was not as to who was the confidential informer, it's clear that the defendant Vernon knew the identity of the person who was there and the question came the other way around, was John Law there. There's been no concession on the part of the Government.

MR. GOLDBERG: Then I suggest in like of Roviero and other decisions, perhaps an in camera hearing or proceeding with this confidential informant might be

ascertained, so as to find out whether or not he was the informant and what part he played on August 6, 1974.

MR. MacBETH: There is no basis in Roviero for a hearing of this nature and the circumstances of this case. Nothing has been pointed out by the defendant in this statement of August 7th of the informer that is in any way contradictory on any major or material fact that has been testified to.

MR. GOLDBERG: I believe there is a case in the Ninth Circuit, United States versus Rollinson, which is in the Court of Appeals that allowed the in camera type hearing that is used in State Courts here in New York.

THE COURT: As I understand the law, to compel disclosure the defendant must show that the testimony would be substantially material to the issues in the case. That is the Ninth Circuit case.

MR. GOLDBERG: Wouldn't his testimony be material as to whether or not the overt acts spelled out in this indictment actually occurred?

THE COURT: No.

MR. MEYERS: Once we have the identity of the so-called confidential informant, it is a question of whether that witness will prove of assistance or benefit to the defense. I have a different problem, as I have

explained to you on several occasions. I do feel that the so-called informant, and he was not an informant, he was a participant, should be produced because I have indicated to you that there was a motivating factor for this man's cooperation; that he was guilty himself and had been found guilty of two narcotics offenses proximate to the date of the alleged offenses of this case. I want to develop what consideration was given by the Government and what role he played in this particular proceeding. I am entitled to know--

THE COURT: Not at all.

MR. MEYERS: I also have the entrapment defense.

THE COURT: I rule otherwise. If you want to put on the entrapment defense, it is up to you. I don't know whether there are any convictions on the part of your client, prior convictions, but if they anticipate an entrapment defense they may even put him on in their direct case. You are aware of that, aren't you?

MR. MEYERS: Yes, but the cases have held, a case that just came out less than three weeks ago, it is not essential for this defendant to take the stand and concede the crimes. I have it from the Circuit Court of Appeals and Sorrels against the United States, because that would put him in a very difficult position--

THE COURT: I ask you to read the Rosner case.

MR. MEYERS: Yes, I have read them all. As I read the decision particularly in this circuit, that if the--if you can first develop the question of entrapment out of the mouths and the testimony of the Government witnesses, and if it develops that they in any way instigated not by necessarily coersion or force, if they instigated or got this thing moving--

THE COURT: No, that is not the law.

MR. MEYERS: May I submit the memorandum to your Honor?

THE COURT: You ought to. Certainly you can.

MR. MEYERS: In fact, the case just came out in this criminal law report today.

THE COURT: Certainly you can. But where the confidential informant merely is introducing the Government agent does not raise the issue of entrapment.

MR. MEYERS: I don't say that. We say we are entitled to examine the so-called confidential agent.

"What did you say to this defendant? What inducement do you make? Did you induce him to believe that you were doing him a favor? Did he know that you were a confidential agent?" And all that.

THE COURT: Obviously he didn't know. No--

MR. MEYERS: The point is, we are entitled to interrogate this confidential agent to determine--

THE COURT: I haven't seen that you have disclosed to me in any way that the testimony would probably be material to a substantial issue in the case. There is nothing like that that you have shown me thus far. And that is the threshhold question, as I take it.

MR. MEYERS: Is your Honor taking the position, then, that I will not be permitted to embark or continue my contention that I want to develop testimony that will establish an entrapment defense?

THE COURT: All I am suggesting to you is that you go ahead and ask the questions you want and I will rule on them.

MR. MEYERS: I have made the request for production of the confidential agent. My second question is that, if I subpoena him, is it your Honor's intention to stop me from examining that confidential agent as part of the defendant's case?

THE COURT: I don't know what I am going to do. You subpoena him and ask him questions and I will rule on the questions that you put to him. Obviously, the fact that you can subpoena him means that you have his address. Is that true?

MR. MEYERS: True.

THE COURT: And have you given that information to Mr. Goldberg?

MR. GOLDBERG: No, I haven't seen it.

THE COURT: Would you give it to him, then? Therefore, there is no need for me to disclose the address of the confidential agent inasmuch as you know his name and address. And there is no need for me to examine him in camera, you may do so. If you want to put him on the stand, you may do so and if there are objections, Mr. MacBeth will raise objections. We have wasted a lot of time here on a charade about the identity and the address. In order to conserve time, I don't see how you are going to do it when you proceed in this manner in which you ask me to do things like that.

MR. MEYERS: I have an address--

THE COURT: I think that is an abuse of the Court and the processes of this Court to do that, proceed in this manner. All right. Next case.

MR. MacBETH: Could we have the suppression hearing on the defendant Payden this afternoon just before the jury comes back? It should be very brief.

THE COURT: I know. Everything should be brief I thought that these witnesses would be brief, but it

didn't turn out that way. What about the end of the afternoon? Will that be sufficient? I don't want to keep the jury waiting.

MR. MacBETH: The officer will be very brief. I would like the hearing to take place at the break.

THE COURT: We will do it at the mid-afternoon recess.

(Luncheon recess.)

AFTERNOON SESSION

(In open court - jury present.)

V A N C E H E R L I H Y, called as a witness, having been duly sworn, testified as follows:

THE COURT: You sound as though you have a nice loud voice. I hope you keep it up.

DIRECT EXAMINATION

BY MR. MacBETH:

Q Officer Herlihy, how are you employed?

A By the New York City Police Department.

Q How long have you been employed by the Police Department?

A Nine and a half years.

Q Where were you on duty on the day of August 6, 1974?

A I was assigned to the New York Drug Enforcement Task Force.

Q What activities in a general sense did you undertake in the course of that evening?

A I was an investigator for a drug operation.

Q Where was that drug operation taking place?

MR. GOLDBERG: Objection.

THE COURT: Sustained.

Q Where were you in the course of that evening?

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A It was the Larlem area, 145th Street, 116th Street.

Q Officer Herlihy, I show you what has been marked Government Exhibit 1 for identification. Can you identify that object?

A Yes, I can.

Q What is it?

A It is Exhibit No. 1 from a case in that area and it has been signed by me as the sealing officer.

Q When that that come into your possession?

A On August 6, 1974.

Q How do you ascertain that?

A I put the date on the envelope when I signed it and sealed it.

Q From whom did you receive the objects in that envelope?

A Police Officer Chris Jackson.

Q What did you do with that exhibit after you had received it?

A At the New York Drug Enforcement Task Force, I gave it a field test and then I weighed it and sealed it in this envelope, heat sealed it.

Q After you had weighed and sealed it, what did you do next with it?

A I placed it in the Task Force safe. On the next

morning I removed it from the safe and delivered it to the DEA lab, 90 Church Street.

Q On the 27th of August, 1974, were you on duty on that day?

A Yes, sir, I was.

Q Where were you on duty?

A New York Drug Enforcement Task Force.

Q In the evening of that day, in a general way, what were your duties?

A As an investigator.

Q Where were you conducting your investigation?

A 116th Street, 145th Street, Lenox Avenue.

Q I show you what has been marked Government's Exhibit 2 for identification. Can you identify that object?

A I can. I received this on August 27th. I sealed it and signed it and dated it. This also was placed in the Task Force safe and this was brought to the DEA lab on August 28th by myself.

Q And that is the same DEA lab that you referred to before?

A 90 Church Street,yes, sir.

Q From whom did you receive the objects in the envelope?

A Police Officer Chris Jackson.

Q Turning your attention now to October 10, 1974, were you on duty on that day?

A I was assigned to the New York Drug Enforcement Task Force and continued in the same operation, 116th Street, 145th Street.

Q I show you what has been marked for identification as Government's Exhibit 3. Can you identify that object?

A I can.

Q What is it?

A This is Exhibit No. 3, the same case. This was sealed by Police Officer Chris Jackson, witnessed by myself. This was placed in the safe on October 3rd. I removed it on October 4th and delivered it to the DEA lab, 90 Church Street.

Q How can you tell that you witnessed the sealing of that?

A I signed the envelope on October 3rd when it was sealed on the witness line.

MR. MacBETH: No further questions.

MR. MEYERS: No cross.

CROSS EXAMINATION

BY MR. GOLDBERG:

Q You said that on October 10th, the day you witnessed the sealing of that third exhibit, you were assigned to an

investigation that took you to 145th Street?

MR. MacBETH: Objection.

THE COURT: Sustained.

I will permit it, but I will not let him go beyond what is in the direct examination. I take it that is the basis of the objection?

MR. MacBETH: He stated October 10th. The witness was in fact talking about October 3rd and 4th.

THE COURT: I have October 10th. That is what I have written down.

Did you say October 10th?

THE WITNESS: On which, your Honor?

THE COURT: Exhibit 3.

THE WITNESS: I have to look at the envelope.

THE COURT: All right. I wrote down October 10th.

THE WITNESS: That was an error on my part. It was the tenth month, the 3rd day.

THE COURT: All right.

Q On October 3rd, it would be your testimony that your testimony took you to 145th Street?

A To at least 116th Street that evening.

Q The question is, did your investigation take you to 145th Street on October 3rd?

A Myself, personally on October 3rd, I don't recall

if I was up on 145th Street myself.

Q Didn't you testify a little while ago on direct that your investigation involved two locations on that day, namely 116th Street and 145th Street?

A Yes, sir.

Q Is it your testimony now that you were mistaken?

A No, sir.

Q Did you personally go to 145th Street?

MR. MacBETH: Objection.

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THE COURT: I will permit it.

A The investigation itself encircled these two areas. Whether I was up on 145th Street that particular time, I don't recall.

Q Officer Herlihy, on August 6th or August 5th, did you have a conversation with an individual known to you as John Law?

MR. MAC BETH: Objection.

THE COURT: Sustained.

Q Did you say John Law on August 6th, 1974?

MR. MAC BETH: Objection.

THE COURT: Sustained. Beyond the scope of the direct examination.

MR. GOLDBERG: Then I will make him my witness, your Honor.

MR. MAC BETH: I don't believe this is the appropriat time to do that, your Honor.

THE COURT: It isn't.

If you want him recalled on your case, he will be made available.

MR. GOLDBERG: I would do that, your Honor.

THE COURT: All right.

Q Officer Herlihy, you identified moments ago three exhibits, three pieces of contraband, is that

correct?

A I did.

Q In identifying that contraband, you had occasion when you looked at it on those days to ascertain what type of a container these three pieces of contraband were in, is that correct?

A If I understand you correctly --

Q You tested some substance, is that correct?

A That is correct.

Q How many times did you test the substance? On how many occasions did you test the substance, all three occasions?

A All three occasions.

Q You used a field tester?

A Yes.

Q And you had to on those three occasions take the substance out of a particular container and test it?

A Yes, sir.

Q I ask you to look at what you have identified and tell this Court whether or not there is any similarity whatsoever between the three containers that you examined on those three dates?

A Any similarity?

Q Yes.

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A Other than each one containing cocaine, no, sir.

Q In other words, there is no similarity whatsoever with regard to the containers?

A No, sir.

MR. GOLDBERG: No further questions.

MR. MAC BETH: No redirect, your Honor.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Next witness.

MR. MAC BETH: The Government calls John Crowe.

J O H N C R O W E, called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MAC BETH:

Q Officer Crowe, how are you employed?

A As an investigator with the New York Drug Enforcement Task Force.

Q How long have you been with the police force?

A Almost 12 years.

Q How long have you been with the Drug Enforcement Task Force?

A A little over four years.

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Q Turning your attention now to the evening of August 27, 1974, were you on duty at that time?

A Yes, I was.

Q Where were you on duty?

A I was engaged in surveillance with the then members of Group 9 in the area of Harlem.

Q Where did that surveillance begin?

A Early in the evening we had rendevoused in the area of 114th Street and Morningside Avenue where our undercover officer, Officer Jackson and several other members of the group held a conference as to the purchase of the drug exhibit.

Q Where did you go from that conference?

A To the area of 116th Street and Lenox Avenue.

Q Will you tell the jury what if anything you saw in the vicinity of 116th Street and Lenox Avenue?

A Relative to this particular incident I really didn't observe anything at this particular intersection at that time. However--

MR. GOLDBERG: Objection.

THE COURT: Yes.

Q Where did you go from that intersection?

A I am sorry but I am a little confused as to the date.

Q This is August 27th I am asking about, 1974.

A As I recall, on that particular evening at approximately 10:30 or so I observed the police officer Jackson seated in the undercover vehicle driving south on St. Nicholas Avenue with two male occupants and drive across 118th Street to Seventh Avenue, down Seventh into 116th Street towards Lenox Avenue, then I lost sight of him.

Q Turning your attention to the period earlier in the evening of August 27, 1974, what did you say at that time?

A I am sorry, I am confused. If I can refer to the Form 6.

MR. GOLDBERG: Objection.

THE COURT: You can't recall?

THE WITNESS: I am confused about the dates.

THE COURT: You filed a report?

THE WITNESS: I consulted with the case officer and he later in turn filed a BND 6 report.

THE COURT: And you need that report to refresh your recollection?

THE WITNESS: Yes.

THE COURT: All right.

Q I show you what has been marked Government's Exhibit 3504 for identification. Does that refresh your recollection as to the events of August 27, 1974?

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A Yes, does.

Q Without the jury what happened in the course of that evening and from the time--

MR. GOLDBERG: Objection. Asked and answered.

THE COURT: I will permit it.

MR. GOLDBERG: Are we in the early part of the evening or the late part?

THE COURT: That is what he asked him for before he refreshed his recollection.

MR. MAC BETH: That is correct.

THE COURT: With your recollection refreshed, tell us what you recall?

THE WITNESS: On August 27th I was surveilling in the area of 116th Street and Lenox Avenue. There came a time that there then commenced a mobil surveillance of Police Officer Jackson in a vehicle with one other male occupant which traveled to the area of Broadway and 148th Street.

Q What happened when that car reached Broadway and 148th Screet?

MR. GOLDBERG: Objection.

THE COURT: No, I will permit it.

A The male passenger had exited and it was lost from my sight. A while later he then returned to the car

and the Police Officer Jackson and the male proceeded to 150th Street and Broadway and again I saw the male passenger ex t and again lost him from sight, then he would then return to the car a few minutes later.

Q After the male passenger had again returned to the car at Broadway and 150th Street, what happened?

A Police Officer Jackson and this male then traveled to 145th Street and St. Nicholas Avenue where they both exited the vehicle after a while and I lost sight of both Jackson and the male.

Q Do you see the male in the courtroom today that you saw exit the vehicle?

A No, I can't identify the male.

Q Whathappened after the car reached 145th Street?

A Police Officer Jackson's car?

Q Yes.

A After a while both occupants exited the vehicle and Jackson and the passenger, and I lost sight of them. Then I received radio communication from my fellow surveillance officers and a while later --

MR. GOLDBERG: Objection.

THE COURT: No. He received communication. What did you do thereafter?

THE WITNESS: A while later I observed a red or

silver Mercedes Benz which had been parked roughly in the same area where Police Officer Jackson's car was, make a U-turn on 145th Street, travel to St. Nicholas Avenue and drive north on St. Nicholas into St. Nicholas Place, then northbound to the Harlem River Drive and 155th Street, then the vehicle continued down the service orad of the Harlem River Drive and out of my sight.

Q Did you follow the car from 145th Street to the service road, to the Harlem River Drive?

A Yes, I did.

Q Would you describe the speed at which the car was driving?

A It was traveling at approximately over 40 miles an hour through the streets of St. Nicholas Place and when it arrived at the Harlem River Drive service road, it was traveling at such an excessive rate of speed, I couldn't keep up with it in my own car.

MR. MAC BETH: No further questions.

MR. MEYERS: No cross examination.

CROSS EXAMINATION

BY MR. GOLDBERG:

Q You were in an automobile, I take it?

A Yes, sir.

Q I am now referring to August 27th. Were you

with another officer?

A No, I was alone in the vehicle that I was operating at the time.

Q Did you have with you a radio in your car?

A Yes, I did.

Q Did you have any other communication equipment such as a walkie talkie?

A No. I had the standard --

Q Police radio?

A Standard task force radio, which is installed in the vehicle.

Q And that radio permits you to receive communications on a specific wave length?

A Yes.

Q All the radios in your team of Group 9 as you call them, were turned into that wave length?

A Yes.

Q At any time on August 27th, did you receive any communication from any police officer assigned to Group 9 directing you to proceed to a particular location?

MR. MAC BETH: Objection.

THE COURT: Sustained.

Q You say you saw an automobile that was parked in the vicinity of 145th Street?

A Yes.

Q Where was it parked?

A On the south side of 145th Street approximately mid-way in the block, or rather closer to St. Nicholas Avenue, between St. Nicholas and Edgecomb Avenue.

Q So it would be further west than it would be east along that street; is that a fair statement?

A Yes.

Q Before that day, did you from any officer receive information -- was your attention ever directed to 365-1/2 145th Street on August 27th?

MR. MAC BETH: Objection.

THE COURT: I will permit it.

A Yes, I had been knowledgeable of that premises for several years now from other criminal investigation matters.

Q Have you ever been in the premises?

A Excuse me?

Q Had you ever been inside the premises?

A No, I haven't.

Q Would you say that this car was parked between St. Nicholas and 365-1/2 145th Street?

A Yes, closer to the address.

Q Closer to 365-1/2 than to St. Nicholas?

A Closer to 365-1/2.

Q Where were you positioned?

A I was located east of St. Nicholas Avenue, rather east of Edgecomb Avenue, approximately half a block east of Edgecomb Avenue facing west, facing the position where the car was parked.

Q You were on 145th Street?

A Yes.

Q You would be on the north side of 145th Street?

A I was on the north side, yes.

Q How far were you from your vantage point to 365-1/2?

A Approximately a block, a block and a half.

Q Were you parked along the curb?

A I was double-parked.

T2 pm

Q Engine running?

A I believe it was.

Q Lights on?

A I don't recall.

Q Do you recall whether it was dark or light out?

A It was dusk.

Q Dusk?

A Yes, sir.

Q What time was it that it was dusk?

A It was approximately 7, 7:15 or something.

Q What time did you arrive there?

A At that particular location?

Q Yes.

A Approximately a half hour, maybe a little bit more earlier.

Q Did you see the automobile that was driven by Officer Jackson at that location?

A I saw him drive into the block and then temporarily lost sight of it as I was repositioning my vehicle.

Q Is it your testimony that you followed the vehicle south on St. Nicholas Avene?

A Whose vehicle, sir?

Q Agent Jackson's, Officer Jackson.

A Jackson's vehicle? I don't recall if I followed

it into the intersection or not.

Q Do you recall following the vehicle at all?

A Oh, yes.

Q When did you follow the vehicle? When was the last time you followed that vehicle?

A From the time I engaged with the other officers in the other vehicles from 150th Street to the area of 145th Street and St. Nicholas Avenue.

Q Where did you lose sight of the vehicle?

A I don't recall at which point it was.

Q Were you on St. Nicholas or were you on 145th Street when you lost sight of the vehicle?

A I don't recall.

Q Would it be fair to state that you proceeded, you took a left turn on 145th Street, proceeded past Edgecomb, took a U-turn and wound up on the north side of 145th?

A Yes.

Q You didn't see the vehicle as you drove by 145th Street?

A At that point I did, as I was driving from St. Nicholas Avenue towards Edgecomb Avenue, I did see the undercover vehicle.

Q Was anybody in it?

A At the time I went by, no.

Q No one at all?

A I didn't observe anybody.

Q Did you look inside?

A I glanced but I didn't happen to notice anybody seated therein as I went by.

Q In other words, one of your obligations on that day was to keep close watch on Officer Jackson, wasn't it?

A Yes, sir.

Q And you didn't look for him when you passed that vehicle?

A It wasn't my intention to look for Jackson when I passed the vehicle.

Q It wasn't your intention?

A No, sir.

Q What was your intention glancing into the vehicle?

MR. MacBETH: Objection.

THE COURT: No, I will permit it.

A I had received a communication several minutes prior to my passing by the vehicle and became aware that another surveillance officer had the undercover officer under observation in his vehicle and I didn't find it was necessary for myself to pay any particular attention to the undercover vehicle other than to ascertain its location at that time,

and then repositioned or positioned myself at a location so that I, too, could keep it under observation.

Q Who was that other surveilling officer?

A Detective Wright.

Q Did you see his automobile?

A No, I did not.

Q Did you see anything from the time you passed 365-1/2 on your way towards Edgecomb and the time you saw the Mercedes which you say you saw pull away; did you see anything at all transpire in that area from your vantage point?

A Prior to the Mercedes pulling away I observed two males exit -- rather enter the Mercedes and then drive away.

Q Were you watching that Mercedes?

A Yes, I was.

Q Did you recognize the individuals who got in the Mercedes?

A No, sir, I did not.

Q Do you know where those individuals came from?

A From the sidewalk area alongside the car.

Q And you left at that point and followed the Mercedes?

A Attempted to surveil it, yes.

Q And how close did you come to the vehicle --

MR. GOLDBERG: Withdrawn.

Q Did the vehicle pass you?

A No, it did not.

Q Where did it go, if you know, from the point where it was parked on 145th Street?

A It U-turned, proceeded to the traffic light at St. Nicholas Avenue and then made a right-hand turn northbound on St. Nicholas Avenue.

Q What was the closest you had come to that vehicle after it had taken the U-turn?

A Less than a block.

Q Where was that that you were less than a block away from that vehicle?

A It was on St. Nicholas Avenue after it had made the right-hand turn approximately one block north of 145th.

Q As it proceeding north on St. Nicholas?

A Yes.

Q And were you able to see who was in the vehicle at that point?

A Other than two males, no, I couldn't see.

Q You could tell it was two males?

A I was satisfied, yes, it was two males.

Q You were able to see there were two males?

A Yes, sir.

Q From a block away?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Is that your testimony? Were you able to see two males in that vehicle from a position a block behind that vehicle?

MR. MacBETH: Objection, your Honor.

A Yes, sir.

THE COURT: No, I will permit it.

A Yes, I was able to see them.

Q And was it still dusk out?

A Yes.

Q From the time that that vehicle was set in motion to the time you set your automobile in motion did you receive any communications?

A Did I receive any?

Q Yes.

A There were several officers transmitting at the same time and --

Q Did you receive any yourself --

A No, I did not.

Q -- that came directly to you?

A At the time I initiated my surveillance--

Q From the time that the Mercedes was put in motion to the time that you put your automobile in motion did you receive any communications?

A I don't recall.

Q Do you recall receiving any communications as you proceeded west on 145th and north on St. Nicholas?

A I was attempting to communicate with the other officers but I didn't receive any.

Q You didn't receive any communications?

A No. It was confused transmission because there were several other people transmitting at the same time.

Q Do you recall whether or not any of those transmissions indicated a direction or a place that you would go to?

MR. MacBETH: Objection, your Honor.

THE COURT: Sustained. Were any of those transmissions legible or readable to you?

THE WITNESS: At that particular time as the Mercedes was U-turning and leaving that location, none of them were legible to me.

Q Did you receive any further communications in connection with that Mercedes as you proceeded through St. Nicholas Place and the service road of the Harlem River Drive?

A Yes, I received a transmission from Special Agent Majors who was attempting to locate me to help me or aid me in the surveillance of the vehicle.

jkh 8 Crowe-cross

Q Do you recall the substance of that conversation?

MR. MacBETH: Objection, your Honor.

THE COURT: No, I will permit it.

A Basically, Special Agent Majors was looking for directions to get to where I was.

Q That was the substance of the communication?

A As I recall, yes.

b2 Q On your way to the Harlem River Drive service road or 155th Street did you encounter any other surveillance automobiles, any group 9 vehicle?

A No, not along St. Nicholas Place.

Q Anywhere, when you were following this Mercedes?

A No, I did not.

Q After you got to the Harlem River Drive you say that you lost the vehicle, is that correct?

A Yes, I lost sight of it.

Q And you turned back?

A Correct.

Q Where did you go?

A I don't recall. I don't recall exactly where I went after I went back.

MR. GOLDBERG: No further questions.

MR. MEYERS: No questions.

THE COURT: Any redirect?

MR. MacBETH: No redirect.

THE COURT: All right, you may step down.

(Witness excused.)

THE COURT: Next witness.

MR. MacBETH: The next witness is Herbert Wright.

H E R B E R T W R I G H T, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MacBETH:

Q Detective Wright, how are you employed?

A I am employed by the New York City Police Department.

Q How long have you been employed by the Police Department?

A Almost 11 years, 10 years and some months.

Q Turning your attention now to August 6, 1974, where were you assigned at that time?

A I was assigned to the New York Drug Enforcement Task Force and on that day at about 9 o'clock I was up in the vicinity of 114th Street and Morningside Drive, New York County.

Q Where did you go from 114th Street and Morningside Drive?

A I went down to the vicinity of 116th Street between Lenox and Seventh Avenue.

Q When you arrived there what did you see?

A I arrived there about 9:30, and about five minutes after being there I saw Mr. Vernon here out in front of 125 West 116th Street.

Q For the record, when you refer to Mr. Vernon, who is it that you are referring to?

THE COURT: Where is he sitting?

THE WITNESS: The first gentleman on the left here at the rear table.

THE COURT: Concede identification?

MR. MEYERS: Concede identification.

THE COURT: Identification of Mr. Vernon conceded. All right.

Q And what did you see take place in relation to Vernon at that time?

A Well, at that time he was standing there, he was talking to an unknown male, talking to a few other people, and then about 10 minutes later I saw Police Officer Jackson and an informant -- I'm not sure what his name is -- pull up and park in front of -- double -- yes, park in front of Jimmy Daniels' bar.

Police Officer Jackson and this informant then got

out of the car and they walked across the street where Mr. Vernon was standing, and I saw the three of them in conversation.

Q And where you in relation to those three individuals when the conversation took place?

A I was west of them, about 20, maybe 10 to 20 feet west of where they were standing and having a conversation.

Q And were you in a car or on foot?

A At that time I was on foot.

Q How long did that conversation last approximately?

A I wouldn't say more than five minutes, I would say.

Q What happened at the conclusion of that conversation? What did you see take place?

A I then saw them walk back across the street to the car that Police Officer Jackson and the informant had arrived in, and I saw the three of them enter the car, and then they went east on 116th Street to Lenox Avenue, and I saw the car make a left turn, and that was the last I saw of them at that time.

Q Did you see the car or any of those individuals at any later time that evening?

A Yes, sir.

Q What time would that be, approximately?

A That would be about 10:30, 10:35 I would say. I saw--

Q Where were you at that time?

A I was still in the vicinity of -- I was still at 116th Street, between Lenox and Seventh, and I saw the car coming back from the direction of Seventh Avenue, and I saw it stop in front of the Jimmy Daniels bar, and I saw Mr. Vernon get out of the car and walk into the Jimmy Daniels bar, and I saw the car continue east on 116th Street to Lenox Avenue.

Q And you then lost sight of them?

A Yes, sir.

MR. MEYERS: Objection.

THE COURT: I will permit it.

Q Did you see Mr. Vernon any more in the course of that evening?

A No, sir, not that I recall. No, sir.

Q Turning your attention now to August 27, 1974, were you on duty at that time?

A Yes, sir.

Q Where were you on duty in the course of that evening?

A Well, that evening I was again on 116th Street, between Seventh and Lenox Avenues.

Q Approximately what time would that be?

A That would be about 5:30 in the evening, about that time.

jkh 13 Wright-direct

Q Could you tell us what if anything you said at 116th Street at that time?

A Well, it was about 5:30 I had gotten there. About 20, 25 minutes later I saw Police Officer Jackson drive his car -- well, I saw him double parking like in front of 125 West 116th Street.

I saw him get out of the car and walk across the street toward Jimmy Daniels bar, and then I saw him over in front of Jimmy Daniels bar in conversation with Mr. Vernon again.

Q What happened when that conversation was concluded?

A Mr. Vernon and Police Officer Jackson then walked back to the car Mr. Jackson was driving and they both got into the car and they went towards Seventh Avenue and 116th Street.

Q And where had you been in relationship to Mr. Vernon and Officer Jackson during the course of that conversation and movement across the street?

A I was on the opposite side of the street at that time, just about opposite of the Jimmy Daniels bar.

Q And when did you next see either Mr. Vernon or Officer Jackson after they had driven off from the area of Jimmy Daniels bar?

A Well, I began to follow them with the other surveillance officers and some time I would see them and sometimes I wouldn't, and I came to a point where we were up in the vicinity of 149th Street and Broadway, where I saw Police Officer Jackson double parking the car on Broadway near 149th Street.

I then saw Mr. Vernon get out of the car and walk south on Broadway, on the west side of Broadway -- excuse me, it would be on the east side of Broadway, walk south to the corner of 148th Street and Broadway, where the Oasis Bar is.

I saw Mr. Vernon go into the bar, stay there maybe about five minutes, then he came back out, and then got back into the car that Mr. Jackson had stayed in, and then the car started going north on Broadway.

Q Where had you been in relationship to Mr. Vernon and Officer Jackson at the time when you saw Mr. Vernon go into the Oasis Bar?

A Well, when Mr. Vernon went into the Oasis Bar I was more closer to 149th Street and Broadway, on the west side of Broadway. When he came out, I was on the corner of 148th and Broadway, opposite, you know, opposite corner from the bar.

Q And what did you see happen next after the car in which Officer Jackson and Mr. Vernon were driving moved off from that location?

A Well, it went north on Broadway and it made a U-turn, I'm not sure which street it made the U-turn at, but it made a U-turn and then -- made a U-turn and then started coming south on Broadway. And they stopped about 150th Street and Broadway, and Mr. --

Q Did anything happen at that time?

A Yes. When the car stopped Mr. Vernon got out of the car and went into the Gallery Bar on Broadway, and he went into the bar and he stayed there a short, maybe five minutes, and then came out and got back into the car with Mr. Jackson -- I mean, with Police Officer Jackson.

Q Where were you in relationship to the Gallery Bar when this took place?

A I was north of the bar, from anywhere to half a block -- well, when -- well, I would say anywhere from half a block to a block north of the bar when he went in, and I was about a block -- a half a block to a block south of him when he came out.

Q What happened after Mr. Vernon once more got in Officer Jackson's car?

A They continued south on Broadway to about 145th Street -- well, to 145th Street where -- well, I think that was the last time I saw him at that point, and the next time I saw them, I saw them around the vicinity of 145th Street and St. Nicholas Avenue. And then I saw them go to 145th Street and Edgecomb, where police officer Jackson parked the car.

(Continued on next page.)

Q And you say you lost sight of them during that period. For how long a period, roughly, did you lose sight of the car?

MR. GOLDBERG: Objection. What period is he talking about?

THE COURT: I think that is proper. Overruled.

A You know, you may lose him a minute here, half a minute, a few seconds. It's a team effort and everyone is, we are communicating with each other--

MR. GOLDBERG: Objection.

THE COURT: Sustained.

Q Was it a brief period?

A Yes, it was brief, yes.

THE COURT: By "brief," you mean seconds or minutes at the most?

THE WITNESS: Yes. Two minutes at the most, I would even say.

Q What did you see happen when you saw Officer Jackson's car parked on 145th Street?

A I saw Mr. Vernon get out of the car and he walked west on 145th Street and I saw him walk--that would be walking from Edgecomb toward St. Nicholas Avenue. He was walking towards St. Nicholas Avenue. And at that time I was on the--on 145th Street, west of--no, east of Edge-

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comb Avenue.

I saw Mr. Vernon, you know, stop in the vicinity of 356-1/2 West 145th Street.

Q What did he do when he stopped?

A Well, due to traffic, you know, at times I did not see him, so I drove the car that I was in up to the side of the street of 356-1/2 on 145th Street, and when I got up there I saw Mr. Vernon in conversation with another male.

Q Do you see that other male in the courtroom today?

A Yes, sir.

Q Would you point him out to the jury?

A The gentlemen in the last table with the beard.

MR. MacBETH: Let the record reflect that the witness is--

THE COURT: For identification of the defendant Payden.

MR. GOLDBERG: This is Mr. Payden, your Honor.

THE COURT: Do you concede that he identified Mr. Payden?

MR. GOLDBERG: Yes, your Honor.

THE COURT: Very well.

Q What happened after you saw Mr. Vernon in

conversation with Mr. Payden?

A Then I saw Mr. Vernon and--what's his name, Mr Who--

Q Payden.

A Mr. Payden go into 356-1/2 West 145th Street. I saw them, you know, go into--go in there. And then, maybe about 20 minutes later I saw Mr. Vernon come out of 356-1/2.

Q What did Mr. Vernon do when he came out of 356-1/2?

A He came out and he walked down to the car which police officer Jackson was sill in, waiting at 145th and Edgecomb.

Q What happened when he arrived at the car where officer Jackson was?

A Mr. Vernon got into the car and they had a short conversation and then both of them got out of the car and they both walked toward, you know, walked back to 356-1/2. They both then walked in and maybe a minute later police officer Jackson came back out and he walked back down to the car. And he got back into the car and then he drove the car, he made a right turn onto Edgecomb Avenue and south on Edgecomb Avenue.

Q When did you next see officer Jackson after he drove off?

A About 10 minutes later he came back and parked at the same location he had previously parked, and he got out of the car and walked back up to 356-1/2, and then into it again.

Q After officer Jackson entered 356-1/2 at that time when did you next see either officer Jackson or Mr. Vernon or Mr. Payden?

A About 15 minutes later police officer Jackson, Mr. Vernon and Mr. Payden came out of 356-1/2.

Q Together?

A And then police officer Jackson, he started walking, you know, very slowly like toward Edgecomb Avenue toward his car, and Mr. Vernon and Mr. Payden, they were, you know, walking a few steps going west, having a short conversation. And then Mr. Vernon went back towards police officer Jackson and they both had a conversation.

Q What happened at the end of that conversation?

A Police officer Jackson went back to his car and Mr. Vernon went back towards 356-1/2 and joined up with Mr. Payden, and he and Mr. Payden got into a Mercedes Benz, it was a silver Mercedes Benz with like a maroon or red vinyl top.

Q Was Mr. Payden or Mr. Vernon in the driver's seat of the car?

A Mr. Payden was driving. It was a two-seater car, if I recall correctly. It was like a sports Mercedes Benz.

Q Did you see the car leave the area?

A Yes, sir.

Q How did it leave the area?

A Well, it was blocked in by double-parked cars and one car moved out of the way, and he maneuvered himself out of the parking space and made a U-turn, passing directly in front of me. He was originally facing east in an easterly direction. He made a U-turn, passing in front of me, going in a westerly direction.

At the corner of St. Nicholas Avenue he made a right turn and continued up St. Nicholas Avenue. He was moving at a pretty high rate of speed, and around about 149th Street, St. Nicholas Avenue runs into another street called either St. Nicholas Terrace or St. Nicholas Place, I'm not sure which; but St. Nicholas Avenue turns off towards the left and St. Nicholas Terrace or Place continues straight. And the car just went up straight towards 155th Street and--well, the car that I was in, I had a hard time keeping up with them. And the last I saw of him was at 155th Street and that St. Nicholas Place or Terrace.

Q In the period from the time when Mr. Vernon and Mr. Payden and officer Jackson came out of the club to the time when Mr. Vernon and Mr. Payden got into the car that Mr. Payden was driving, where were you in relationship to those three people?

A I lost your question, sir.

Q In the period between the time when they came out of the club and Vernon and Payden drove off, where were you in relationship to Vernon and Payden?

A Oh, I was directly across the street from that 356-1/2 West 145th Street. I was directly across the street.

Q After you lost sight of the Mercedes Benz on St. Nicholas Terrace or Street, did you see Mr. Vernon or Mr. Payden again in the course of that evening?

A No, sir.

Q Turning your attention now to October 3, 1974, were you on duty at that time?

A Yes, sir.

Q Where were you on duty?

A I was on 116th Street between Seventh and Lenox again.

Q What time of the day or evening would that have been?

A I think that was about 8:30.

Q What did you see take place in that vicinity in that evening?

A I saw police officer Jackson park his car on Lenox Avenue near 116th Street. That would be about the northwest corner, the northwest corner of 116th Street, and Lenox Avenue. I saw him park his car.

He got out of his car and then walked to the vicinity of Jimmy Daniels' Bar again. Then I saw him in conversation with Mr. Vernon.

Q After that conversation was complete, what did you see Mr. Vernon and Mr. Jackson do?

A They both walked across the street to a restaurant, I think the restaurant was Soul Expression Restaurant, and I saw them both go into the Soul Expression Restaurant.

B2 Q Do you know how long they were in the Soul Expression Restaurant?

A 30, 35 minutes. Something like that.

Q Did you then see them come out of the Soul Expression Restaurant?

A Yes, I did.

Q What happened after officer Jackson and Mr. Vernon came out of the Soul Expression Restaurant?

A At that time I was west of the restaurant and I

saw them coming out, and they were walking in my direction, and as they were walking, I thought that they were going to pass me, and at that time they were about in front of 125 West 116th Street. And I thought they were going to pass me, so I turned my head and looked in the other direction. And when I turned back around again, I didn't see them.

Q So that you last saw them in front of 125 West 116th Street?

A Yes, sir.

Q How long was it between the time when you last looked at them and when you looked back?

A Excuse me?

Q How long a period was it when you looked away from them to when you looked back to where they had been?

A 15 seconds, the most, I would say.

Q Did you see Mr. Vernon and Mr. Jackson, officer Jackson at any time later that evening?

A Yes, sir.

Q When was that?

A That was over an hour later, I saw officer Jackson and Mr. Vernon and an unknown, some unknown male, come out of 125 West 116th Street.

Q What did you see officer Jackson and Mr. Vernon

do when they came out onto the street from 125 West 116th Street?

A They came out of the building and they went left or east on 116th Street and they went back to the restaurant, the Soul Expression Restaurant. And they went in there and about five minutes later police officer Jackson came out and he went down towards Lenox Avenue towards his car.

Q What did you do at that time?

A I remained in the area and after receiving-- after having radio communications I went into the Soul Expression Restaurant.

Q What if anything did you see in the restaurant?

A I saw someone later identified to me as Lester Bell.

Q How long did you remain in the restaurant?

A I didn't stay long. A minute or two at the most.

Q What did you do after you left the restaurant?

A I left from the area.

MR. MacBETH: No further questions at this time.

MR. MEYERS: No cross.

(Continued on next page.)

BY MR. GOLDBERG:

Q Officer Wright, on August 6, 1974, did you have occasion any time that day or evening to see this gentleman, Donald Payden?

A On August 6th?

Q Yes.

A No, sir.

Q On August 27th, you stated that you were in a surveillance vehicle, is that correct?

A Yes, I was in a vehicle.

Q You were assigned to make surveillance?

A I was assigned to conduct surveillance, yes, sir.

Q Were you with any other officer of Group 9?

A No, I had a car to myself.

Q Officer Herlihy was working with you, also was assigned to the group that night, that evening?

A Yes, I believe so. I don't remember specifically.

Q You mean you don't know who was working with you that evening?

MR. MAC BETH: Objection.

THE COURT: I will permit it.

Q Do you or don't you know who was working with you?

A I know generally who was working with me.

Q Who was generally working with you that night?

A Special Agent Majors, Detective Delcorso. Officer Miles Harrington, Sergeant Porter.

Q How about Officer Herlihy? Do you have a vague recollection of him working that night?

A Yes, I do have a vague recollection, as a matter of fact, I do.

Q I can't hear you.

A As a matter of fact I do have a vague recollection.

Q Before you testified today, did you discuss this case with anyone?

A With Mr. MacBeth.

Q Did you look at any documents or reports?

A Yes, sir.

Q Is it partially through your seeing those reports that you are able to be as exact as you are with respect to those incidents in your behalf?

A Well, they help me to refresh my recollection, yes, sir.

Q Do you recall seeing in any of those reports that Officer Herlihy was working that night?

A I wasn't interested in what Officer Herlihy was doing. I was interested in what I saw.

Q You were driving a vehicle that night. Do you remember what vehicle it was?

A It was a green Rambler.

Q Was that your own?

A It was a Government car.

Q A green Rambler?

A Yes.

Q Do you know the year?

A '71, I think.

Q Prior to that date, had you worked with Officer Herlihy on another occasion?

A Yes, we were in the same team.

Q Do you know whether or not he had a vehicle that night?

MR. MAC BETH: Objection.

THE COURT: I will permit it.

A I remember him being in a vehicle that particular evening. I remember him being in a vehicle on Broadway, so he was in a vehicle.

Q When you say Broadway, Broadway and where?

A Broadway from in the vicinity of 148th Street, 150th Street.

Q In other words, you, Officer Herlihy and Officer Jackson at that particular area at one time on August 27th, you were all in automobiles?

A On Broadway, yes -- well, sometimes I would be

out of the vehicle.

Q I don't mean continuously. At least at one particular time, whether it would be a second or a minute, you, Officer Herlihy and Officer Jackson had three vehicles, operated three vehicles, whether it be for a minute or five minutes; is that correct?

A That is correct.

Q And you were, as you testified earlier, watching Officer Jackson's vehicle?

A Yes.

Q Do you know what kind of vehicle he was driving?

A He was driving a brown or beige colored Cadillac with a brown vinyl top.

Q You said that you saw at various times Mr. Vernon enter and exit from a couple of bars.

A Yes.

Q The Oasis and the Gallery?

A Yes.

Q Have you ever been in these bars?

A I have been in the Oasis.

Q Is it a large bar?

A It depends what you call large.

Q Is it bigger than this courtroom?

A No.

Q How would you estimate its size in relation to this courtroom, half of its size, a third of its size?

A I would say it takes half the size of the area beyond the bannister, there.

Q Half the size fro.. here back to the wall?

A Yes.

Q In other words, one half this distance from here to the wall?

A Yes.

MR. GOLDBERG: Let the record indicate that would be about 30 feet the whole distance --

MR. MAC BETH: Objection.

THE COURT: We can find out what it is for the record later on. I don't have the dimensions here.

Q First you saw Mr. Vernon go into the Oasis Bar and later the Gallery Bar?

A Yes.

Q The Gallery Bar you indicated was on Broadway?

A Yes.

Q And you saw Mr. Vernon exit that bar?

A Yes, sir.

Q Get into Officer Jackson's automobile and proceed on Broadway?

A Proceed what?

Q Proceed on Broadway?

A South on Broadway.

Q To 145th Street?

A Yes.

Q When the vehicle proceeded south -- did you have it under surveillance? Did you lose sight of it on Broadway?

A At times I did because I was in front of him when he came out. In other words, I was south of Officer Jackson's vehicle when Mr. Vernon came out of the bar and went in the car.

Q And proceeded past you?

A Yes.

Q I would imagine you let the car as it was proceeding down Broadway proceed for a distance, then you started up your engine and followed it.

A I followed him, yes.

Q Did you follow it down to 140th Street?

A I don't think so, no, sir.

Q Did you lose sight of it?

A I didn't go to 145th Street.

Q Where did you go after that?

A I think I am not sure if I made a left turn at 146th or 148th Street.

Q But in any event, before you took this, you say left turn, the car was proceeding down Broadway and was at least, would it be fair to say, between 145th and 146th on Broadway or between 147th and 148th if your right turn was at 148th Street?

A First of all, I made a left turn.

Q Whatever turn it was, did you see the car in front of you on Broadway?

A When I made the turn?

Q Yes.

A I am not sure, I don't really recall.

Q When you made your turn, where did you proceed?

A I made a left turn and proceeded toward east, on whatever street I was going and like I said, I am not sure if it was 146th or 148th Street, but I continued east.

Q Where did you go? Where did you stop your vehicle?

A I know that I saw him again at 145th --

MR. GOLDBERG: Objection. I ask the Court to direct the witness.

THE COURT: Yes.

Where did you see him again?

THE WITNESS: 145th Street.

Q The question is, where did you stop your vehicle?

A When you say stop my vehicle, what do you mean?

Q I think you said you took a left turn?

A Yes.

Q On 146th or 148th Street, is that correct?

A Yes, sir.

Q When you took that left turn, you were proceeding in what direction, east or west?

A East.

Q Proceeding east on either 146th or 148th Street, where did you go and where were you when you finally turned off the ignition of your car?

A When I finally turned off the ignition to my car?

Q If you did or when you came to a full stop --

THE COURT: You have several questions in there.

A If you give me more specifically as to what you want.

Q I will phrase it this way:

There came a point where you maintained surveillance from a fixed position in your automobile, is that correct, later that night?

Do you understand my question?

A From a fixed position, okay.

Q No longer mobile observations, fixed. Where was

the avenue you took this turn that you maintained fixed surveillance?

A After making that turn, when I first maintained a fixed position to observe the movements of Mr. Jackson and Mr. Vernon was on 145th Street east of Edgecomb Avenue facing west.

Q To your best recollection, is that where you maintained the next period of time, a fixed position, 145th Street east of Edgecomb on the north side, the north side of 145th?

A Yes.

Q Facing west?

A Facing west.

Q Were you directed to go to that spot?

A To that spot, no. I wasn't directed to go to that spot.

Q Were you directed to go to that area?

A No, sir.

Q In other words, your testimony is that you followed the vehicle, then decided to leave it alone, took a turn then went to a spot that no one had directed you to?

MR. MAC BETH: Objection.

THE COURT: You asked him what he did and he told you.

Q When you got to your position on the east side of Edgecomb, where was this Cadillac that Officer Jackson was driving?

A 145th on the est of Edgecomb facing east. That would be the south side of 145th Street facing east.

Q The south side facing east?

A West of Edgecomb Avenue.

Q West of Edgecomb?

A Yes.

Q And would the car be between 365-1/2 West 145th Street and Edgecomb Avenue?

A Yes.

Q That is where it was?

A Well, it was right there at the corner of Edgecomb Avenue.

Q Right on the corner?

A Right on the corner.

Q How far was it from 365 --

THE COURT: You have used these numbers 365-1/2 and 356-1/2.

Q How far was it from 356-1/2 West 145th Street?

A Three-quarters of a block.

Q Three-quarters of a block away?

A Yes.

Q Was it parked anywhere near a Mercedes?

A The Cadillac?

Q Yes.

A No, sir.

Q Where was the Mercedes parked?

A At that time, I didn't even know a Mercedes existed.

Q At a later time you testified you did see a Mercedes?

A Yes, sir.

Q When you did see that Mercedes, how far would the Cadillac have been from the Mercedes?

A About three-quarters of a block.

Q Where was the Mercedes when you first saw it?

A When I first saw it, where was it in relation to the Cadillac?

Q Where was it in relation to the Cadillac -- where was it in relation to 356-1/2?

A It was west of 356-1/2.

Q West?

A A couple of doors west of 356-1/2.

Q The Mercedes was between 356-1/2 and St. Nicholas?

A Yes.

Q Yox are sure about that?

A Yes, positive.

Q And you are also sure the car you saw went down Broadway, the Cadillac?

A Oh, yes.

Q You cannot be wrong?

A I am telling you that is what I said.

Q Did you see the Cadillac come to a stop and pull in that block?

A What block?

Q 145th.

A The next time I saw it from Broadway was 145th Street and St. Nicholas Avenue, the Cadillac. They were stopped at a light at St. Nicholas Avenue going east on 145th Street.

Q Did you see Officer Herlihy's car stop?

A I don't recall.

Q Did you know what car he was driving?

A I don't know what car he was driving.

Q Before you go out on surveillance, you somehow communicate to each other so you know what cars you are using that night?

A The only car I think that we are interested in when we go out on surveillance is the car that is utilized as a UC car or undercover car.

Q In other words, you are not interested in what cars your brother officers are driving that night?

A Not particularly.

Q It wouldn't help in any manner?

A I wouldn't think so.

MR. MAC BETH: Objection.

THE COURT: I will permit it.

Q When the Cadillac was stopped at this light, how far were you away from it?

A From the Cadillac?

Q From the Cadillac, your position.

A I was behind the Cadillac.

Q You were behind the Cadillac. When it stopped at the light at 145th and St. Nicholas?

A Yes.

Q Were you moving at that time?

A I had to stop at the light also.

Q You mean you were in motion?

A I had to stop for the light, if that is what you are asking me.

Q Is it your testimony that you were behind this car as it pulled up on 145th Street?

A When I pulled up -- when I pulled up behind the Cadillac or the undercover car, the undercover car

was waiting for the traffic light to change green.

Q Did this undercover car -- did eventually as you say, proceed and park and stop at an area on 145th Street between Edgecomb and St. Nicholas?

A Yes, sir.

Q I am asking you, were you behind the car when it stopped?

A I was behind the car when it pulled over. Then I continued past.

Q A moment ago I asked you a question and you indicated to me you were parked on 145th Street east of Edgecomb.

A That is correct.

Q Is that where you went after you followed, after the car stopped and you passed it?

A When it pulled over, I continued west then I made a U-turn and came back into that position.

Q You continued west?

A I am sorry, east. I continued east then made a U-turn.

Q In other words, you went past Edgecomb, turned around and parked on the east side of Edgecomb Avenue?

A On the east side of Edgecomb. On the north side of 145th.

Q When did you pick up the Cadillac after you say you took the turn at 148th or 148th Street?

A I saw the car again at 145th and St. Nicholas.

Q When you saw this car at 145th and St. Nicholas, was it on 145th?

A It was on 145th.

Q And it was crossing St. Nicholas?

A That is what I said.

Q Did you ever see the car on St. Nicholas Avenue at that particular stage?

A Only at the crossing.

Q Never proceeded up or down north or south on St. Nicholas?

A Not as I recall, sir.

Q When the Cadillac stopped, you say it was near Edgecomb Avenue?

A Yes.

Q Was it parked along the curb?

A It was parked along the curb.

Q It was in a parking spot?

A Yes.

Q Sure of that?

A Positive.

Q When it pulled up to that stop, who if anybody

got out?

A As I said, I made a U-turn and I came back and I saw Mr. Vernon get out of the car and walk toward 356-1/2.

Q At the time you saw Mr. Vernon walk towards 356-1/2, was Jackson still in the car?

A Yes, sir.

Q When Vernon got to 356-1/2, can you describe that area, that scene at that time?

A I saw that he stopped over there in that area and I drove the car that I was in from the east side of Edgecomb Avenue to opposite 356-1/2 and I parked the car there.

Q In other words, when Vernon got out of the car, you crossed Edgecomb and proceeded to the middle of the block?

A When I saw him stop in the vicinity of 356-1/2, I then proceeded west on 145th Street and parked opposite 356-1/2, 145th Street and that would be on the north side of the street.

Q Did you see Officer Herlihy at that point?

A I don't recall, sir.

Q Did you see Officer Herlihy's car or Officer Herlihy when you were on the east side of Edgecomb?

A I don't recall.

Q If you had seen him, would you recall that?

MR. MAC BETH: Objection.

THE COURT: Sustained.

Q Pulling up to across 356-1/2, when you again stopped your vehicle, where was Mr. Vernon?

A He was outside, like in front of 356-1/2 in conversation with Mr. Payden.

Q Was anybody else there, any other individuals?

A That they were in conversation with?

Q In front of 356-1/2?

A Women walking by.

Q Nobody standing around leaning on cars, anything like that?

A There were a few people around, yes.

Q Were there a few people around in the general vicinity of the front of 356-1/2?

A No. I would say people were around the general vicinity of 145th Street and St. Nicholas and Edgecomb.

Q A lot of people out in that area, is that a fair statement?

A I would say there are quite a few people out there as far as the whole block is concerned.

Q It was a summer night?

A Yes.

Q When you pulled up and stopped your car and saw

Mr. Vernon in front of 356-1/2, did you see at that point Officer Jackson?

A Did I see him where?

Q When you pulled up in front of across the street of 356-1/2.

A I had just left him at 145th -- over there at Edgecomb Avenue.

Q You passed his car?

A Yes.

Q When you passed his car, did you give him any signal?

A No, sir.

Q You just stopped yourself -- at that point how long did Mr. Vernon and Mr. Payden, as you say, engage in a short conversation?

A A few minutes, then they went inside to 356-1/2.

Q How long were they there?

A About 20 minutes later Mr. Vernon came out of 356-1/2 and went down to the car that Officer Jackson was in

Q He walked east towards that car?

A Yes.

Q What did he do? He got in the car?

A Yes.

Q How long did they spend in the car together?

A A minute, two minutes, the most.

Q Was there anybody else in that car besides Officer Jackson and Mr. Vernon?

A No, sir.

Q Then Mr. Vernon got out or both of them got out?

A Both of them got out.

Q And they proceeded west towards 356-1/2?

A Yes.

Q When they reached 356-1/2, did you see Mr. Payden?

A No, sir.

Q You say they entered the bar?

A What?

Q They entered 356-1/2, both of them?

A Officer Jackson and Mr. Vernon went into 356-1/2.

Q How long was it before either one of them came out?

A A minute.

Q Who was that?

A Officer Jackson.

Q Did Vernon come with them?

A No, sir.

Q Did you see Vernon when the door opened?

A No, sir.

Q Where did Mr. Jackson go?

A He went back to the Cadillac.

Q He walked back to the Cadillac near Edgecomb Avenue?

A Yes.

Q How far from Edgecomb was that car parked, how many car lengths?

A From the corner?

Q From Edgecomb.

A It was the first car.

Q The first car --

A On 145th Street west of Edgecomb Avenue.

Q And it wasn't double-parked?

A As I recall it.

Q And it wasn't double-parked --

THE COURT: He said as far as he recalls it.

Q It wasn't double-parked in front of 356-1/2, 145th Street?

A No, sir.

Q Jackson got into the car and drove off?

A Yes. He made a turn.

Q You didn't move your vehicle?

A I was on foot at the time.

Q You got out of your vehicle after you parked it in front of 356-1/2?

A Yes, sir.

Q How long did it take him to come back?

A Ten minutes, 12 minutes.

Q He came back,then he went into the club?

A Yes.

Q Incidentally, have you ever been in that club?

A No, sir.

Q When for the next time did you see either Mr. Vernon, Mr. Payden or Officer Jackson? How long after that?

A About 15 minutes later.

Q You were on foot?

A No, I was in the car.

Q You got back in it?

A Yes.

Q Your testimony was three of them walked out together.

A Three of them walked out the same time.

Q Did you see them talking to each other?

A I could see maybe they were talking. Mr. Vernon-- Mr. Vernon motioned to Officer Jackson and then Mr. Vernon and Mr. Payden took a few steps in a westerly direction and Mr. Jackson, he started walking in an eastly direction on 145th Street.

Q In other words, you would say that the parties were walking towards -- Mr. Payden was walking towards what you later learned to be his vehicle and Jackson was walking towards his vehicle?

A They were walking in opposite directions.

Q How far at the furthest point were they when they left that club?

A Excuse me?

Q How far was the furthest distance between Jackson and Payden?

A I don't understand your question, sir.

Q Did you say Mr. Payden in conversation with Officer Jackson?

A Not that I would say that they were -- I would say when they were coming out, like I said before, I remember Mr. Vernon motioning to Officer Jackson, then walking and it looked like he was in conversation with Mr. Payden, but --

Q Who was in conversation?

A Mr. Vernon.

Q My question to you was, did you see what looked to be a conversation from your vantage point across the street between Donald Payden and Jackson?

A Not that I recall, sir.

Q Were they facing each other in close proximity at any time?

A No, because when they came out they just walked out and started going in different directions, as I recall.

THE COURT: We will take a recess here for ten minutes.

(Jury leaves courtroom.)

(Recess.)

(The jury entered the courtroom.)

Q Officer Wright, did you see Agent Majors on 145th Street when you made those last observations you spoke of?

A I don't even remember what the last observation I spoke -- you mean on 145th Street at 365?

Q Yes, speaking about the time you saw Mr. Payden, Mr. Vernon and Officer Jackson come out of the 365 Club.

A Did I see them?

Q When you saw them, about that time did you see an Officer Majors, Agent Majors?

A I don't recall, sir.

Q Do you recall on that date the type or model of the vehicle he was operating?

A Who, Agent Majors?

Q Agent Majors.

A No, sir.

Q And you had seen Agent Majors before, you had worked with him on prior occasions?

A Yes, sir.

Q You knew what he looked like?

A Yes, sir.

Q If he passed by 145th Street would you have noticed him?

A Well, if I was up there on my own and didn't see him -- and happened to see him, I wouldn't have noticed him, yes.

Q I am talking about August 27th when you were in your vehicle parked on the street, and on foot in the vicinity of 365-1/2.

MR. MacBETH: Objection, your Honor.

THE COURT: Sustained, yes.

Q Is it your testimony then that you did not to your recollection see Agent Majors on 145th Street about the time you saw Jackson, Vernon and Payden exit 365-1/2?

MR. MacBETH: Objection.

THE COURT: No, I will permit it. You didn't see Agent Majors, or don't recall.

THE WITNESS: No, sir, I don't recall.

THE COURT: You don't recall seeing Agent Majors.

THE WITNESS: No, sir.

Q You say you then saw this Mercedes, you saw two individuals get into the Mercedes?

A I say Mr. Payden and Mr. Vernon get into the Mercedes.

Q Where did that Mercedes go?

A It made a U-turn from where it was parked on 145th Street, made a U-turn going from an easterly

direction to a westerly directly and it went to St. Nicholas Avenue.

At St. Nicholas Avenue it made a right turn and it went up --

Q Proceeded up St. Nicholas?

A Yes, it proceeded north on St. Nicholas.

Q I take it when that car turned north, you also followed it, or put your car in motion?

A Yes, sir.

Q You ultimately turned the corner also?

A Yes, sir.

Q And when you turned the corner did you see Agent Majors' car or Officer Herlihy's car at any time?

A I don't recall seeing that car, no, sir.

Q How far when you had turned the corner were you behind the Mercedes?

A I would say it had a good two-block lead on me.

Q Had a two-block lead on you then?

A Yes.

Q After the Mercedes had made that U-turn did you immediately follow it?

A Yes.

Q Were there any cars as you turned the corner up St. Nicholas between yourself and the Mercedes?

A A number of cars, and I remember Officer Crowe was in front of me, too.

Q Excuse me.

A Officer Crowe.

Q What kind of car was he driving?

A A beige Mercury, I think it was.

Q So you and Officer Crowe followed?

A Officer Crowe was in front of me. He had a better jump on me, a better jump than I did.

Q Did you catch up to Officer Crowe's car?

A I think around the area of 155th Street, yes.

Q You say you were going about 40 miles an hour?

A Excuse me?

Q Were you going about 40 miles an hour?

A I was going as fast as I can go. I would say in excess of that.

Q And you said the car took a turn on 155th?

A Excuse me?

Q Did the car, the Mercedes, take a turn on 155th?

A That is the last I saw of it.

Q Where was it when you last saw it?

A At 155th Street.

Q On what, on St. Nicholas?

A St. Nicholas Terrace, or Place, whatever that is.

Q When that car was at 155th, where was your car?

A I was about two blocks away south of it.

Q You don't know whether it went straight ahead, right or left?

A No, sir.

Q Where did you go after that?

A Where did I go?

Q Yes.

A I went back down to 161st Street between Seventh and Lenox Avenues.

Q Were you directed to go there through any communication?

A Yes.

Q Did you receive that communication while you were en route towards 155th?

A No, not while I was en route to 155th.

Q Did you receive that communication when you pulled away from 145th Street to the time when you got in the vicinity of 153rd?

A I didn't receive that communication until after the Mercedes was lost at 155th Street.

Q From whom did you receive that communication?

A I don't know. I received it via radio.

Q Over your radio, was it loud and clear?

A Yes, sir.

Q In effect did that communication say, go to 116th Street?

A Well, that was the --

MR. MacBETH: Objection, your Honor.

A Where I was directed to -- excuse me.

Q Was it directed at you or was it directed to all officers in Group 9?

A It wasn't directed to all officers in Group 9.

Q Was it directed to you?

A It was directed to some of us.

THE COURT: What was the message, do you know, as long as we are finding out about it?

THE WITNESS: Well, the message was that Mr. Vernon and Mr. Payden were going to pick up a package and was to meet Officer Jackson down on 116th Street in the vicinity of the Jimmy Daniels Bar.

Q How long in time did you receive that communication from the time you put your car in motion?

A Excuse me?

Q How long after you put your car in motion and took the right turn on St. Nicholas Avenue did you receive this communication? Was it a matter of minutes, seconds, half hour, an hour?

A No, it wasn't that long. I'd say after the Mercedes was lost, maybe ten or fifteen minutes -- not even that. Five or ten minutes, I received that communication.

MR. GOLDBERG: No further questions.

THE COURT: Any redirect?

MR. MacBETH: No redirect, your Honor.

(Witness excused.)

MR. MacBETH: May we approach the bench, your Honor?

THE COURT: I understand your problem. How long will the next witness take?

MR. MacBETH: It depends on the next witness. If the next follows a short break, I would appreciate it very much.

THE COURT: I intend on Friday afternoon to let this jury out of here around 4:30 or so.

MR. MacBETH: I think we could complete that within that period of time. It's extremely brief, your Honor.

THE COURT: All right. Will the jury file out for a short recess. We have a matter to take care of.

(The jury left the courtroom.)

THE COURT: Call the witness.

MR. MacBETH: I called Miles Harrington.

M I L E S H A R R I N G T O N, called as a witness,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MacBETH:

Q Officer Harrington, turning your attention to October 22nd of this year do you remember being in my office at approximately 11:55 in the morning?

A Yes, sir, I do.

Q Who else was present in the room that time besides you and myself?

A Mr. Payden.

Q Was I interviewing Mr. Payden at that time?

A Yes, sir, you were.

Q Did I inform Mr. Payden of his constitutional--

MR. GOLDBERG: Your Honor, are we proceeding on a Huntley?

THE COURT: Yes.

MR. GOLDBERG: I didn't realize it until the jury was excused.

THE COURT: That's all right. He said he was in Mr. MacBeth's office of October 22nd of this year at about 11:55 in the morning when Mr. Payden was there. You have that, Mr. Goldberg?

MR. GOLDBERG: Now I do, your Honor. I just didn't know what we were doing.

THE COURT: That's all right. We indicated earlier that at the recess we would have this hearing.

Q So there be no mistake, would you identify for the court who Mr. Payden is?

A The gentleman over there with the beard?

MR. MacBETH: Indicating the defendant Payden.

THE COURT: Indicating the defendant Payden.

Q Do you remember that I informed Mr. Payden of his constitutional rights?

A Yes, I do.

Q What were those constitutional rights of which I informed Payden?

A That he had a right to an attorney; that he had a right to remain silent; anything he said would be used against him; if he could not afford an attorney, one was provided for him.

Q Did Mr. Payden indicate whether or not he understood those rights?

A Yes, sir, he did.

Q He indicated he did understand them?

A Yes. He said,as I recall, he said "Yes," and "Yeah."

Q Do you remember my showing Mr. Payden a copy of the indictment in the case?

A Yes, I do. I remember you went out of the room

and made a Xerox copy and gave a Xerox copy to Mr. Payden.

Q After I had shown Mr. Payden the indictment did he make any statement in relation to the charges in the indictment?

A Yes. I recall he said he didn't know anybody in the indictment that was charged with him, and he had never been with any of those people at one time.

MR. MacBETH: No further questions, your Honor.

b2 MR.GOLDBERG: Willthe government stipulate that my partner, Howard Finger, on the day that Mr. Payden was arrested telephoned the U.S. Attorney's office just after the arrest and spoke to an Assistant U.S. Attorney for the name of Mr. Bannigan and he requested that no U.S. Attorney or agent is to speak to Mr. Payden?

MR. MacBETH: I don't know whether or not that is a fact. When I went down to the Magistrate's Court Mr. Finger was there. He told me he had spoken to Mr. Bannigan. He did not say at that time that he had asked that no attorney speak to Mr. Payden. I certainly had no communication before I began this interview, from Mr. Bannigan or any other Assistant United States Attorney, or anyone in the office about any call whatsoever from Mr. Finger or anyone else claiming to be representing Mr. Payden.

I do believe at that time Mr. Finger also said

something to the effect that it didn't really matter very much.

THE COURT: Wait a minute. We can't try this issue on statements of counsel. That is something we can't do.

MR. GOLDBERG: Your Honor, it is our contention that if this advice, so to speak, was given by Mr. Finger, then the U.S. Attorney's office should not have commenced questioning.

THE COURT: Isn't that the correct law, Mr. MacBeth? That if you have been notified that an attorney has been retained, and if you have been given instructions that you should not question him, then you cannot question him.

MR. MacBETH: That is correct, your Honor. But I had received no instructions--

THE COURT: That isn't the question. The question is did you office receive any.

MR. MacBETH: Not to my knowledge, your Honor. When Mr. Finger spoke to me in the Magistrate's office that day, he did not indicate to me that no one was to speak to Mr. Payden.

(A hearing out of the presence of the jury.)

MR. GOLDBERG: Mr. Finger was here during the luncheon recess and there was a matter before Judge Conner in this court and had to leave. Without any derogation to Mr. MacBeth, he didn't tell me the communication he had with Mr. Finger. He did say that he did speak with Mr. Bannigan who he spoke to before Mr. Payden was even brought near the Magistrate's Court, in other words, while he was still being processed or questioned and the paperwork was begun.

I would like to call Mr. Finger or Assistant District Attorney Mr. Bannigan, if that being the case.

THE COURT: I think we have to find that out. I don't see how else we can do it.

Mr. Goldberg is not accusing you of doing anything.

MR. MAC BETH: I understand.

THE COURT: He is raising a legal question. If he retained an attorney and the attorney had indicated he didn't want his client interrogated by anybody and if that had been communicated prior to the time you did do the interrogating, perhaps the statement that was made is not properly admissible.

MR. MAC BETH: I understand that. I was simply replying.

THE COURT: Do you want to do this? Do you want to cross examine this witness? I understand this witness can't be back again.

MR. MAC BETH: That is right.

THE COURT: Do you want to cross examine this witness at this time and in the event we hold it is admissible, we can read the transcript into the record.

MR. GOLDBERG: Then he can't testify at the trial in chief.

THE COURT: There is a difficulty about it.

MR. GOLDBERG: I didn't understand we had that difficulty.

I take it he is not employed by the Police Department?

MR. MAC BETH: He is.

He is going on his first vacation in four years. That is why I was trying to do it today so he could leave.

I would like to put him before the jury for one other point. He is a link in the chain of custody as to difficulty bringing the drugs from the lab to me on the 30th, so I would like to put him in for that.

THE COURT: You wouldn't stipulate if he were called he would testify --

MR. GOLDBERG: As far as the chain of custody.

THE COURT: Then you ought to dictate the stipulation into the record.

MR. GOLDBERG: I will not stipulate so far as the Huntley material.

MR. MAC BETH: I am asking for a stipulation as to the chain of custody that if Mr. Harrington --

THE COURT: Why don't we get the jury in and let him testify to it. The other part we can't do anything about.

MR. MEYERS: Your Honor, I object to any statement made by Mr. MacBeth as being post conspiracy and not at all binding.

THE COURT: It wouldn't be binding on you.

MR. MEYERS: I want to make that very emphatic.

THE COURT: You don't have to. There is no doubt about it.

CROSS EXAMINATION

BY MR. GOLDBERG:

Q When, Officer Harrington, did Mr. MacBeth to the best of your recollection conclude his questioning of Mr. Payden?

A I believe I was in Mr. MacBeth's office with Mr. Payden at the most a half hour.

Q When did that begin, when did that end?

A We got there about 11:30. I would say we were there before 12:00 o'clock or 11:45. We got there and 12:15 we were out. It was about a half hour.

Q Where did this questioning take place?

A Mr. MacBeth's office.

Q Where is Mr. MacBeth's office?

A On the ninth floor, I believe, or the seventh floor. I think it is the seventh floor of One St. Andrews Plaza next door.

Q And yourself, Mr. Payden and Mr. MacBeth were in this room?

A Yes.

Q Nobody else was present?

A No, sir.

Q Do you know an Assistant United States Attorney by the name of Bannigan?

A No, I don't.

Q Did you bring Mr. Payden to that room?

A Yes, I did.

Q From the time Mr. Payden was brought into that room until the time you eventually left, did anybody else walk in or out of that room?

A Not that I recall.

Q At any time during this conversation that you

speak of, did the telephone ring?

A I don't recall.

Q Did you go to the arraignment?

A Yes, I did.

Q At the arraignment before the Magistrate, did you see an attorney who represented Mr. Payden?

A Yes, I did.

Q Did that attorney have a mustache?

A I don't recall. I couldn't say.

Q Have you seen him here today?

A No, I haven't been in this room.

Q Do you know what time it was that Mr. Payden was taken to the Magistrate?

A Around 12:00 o'clock, 12:15. 12:20.

Q And you say that Mr. MacBeth advised Mr. Payden of certain rights that he had?

A Yes, sir.

Q Did Mr. MacBeth read from anything when he gave him those rights?

A They were written down on a piece of paper and as Mr. Payden answered, the answer was put down on a paper also.

Q Do you recall any questions pertaining to prior arrests of Mr. Payden?

A Yes, I do. I believe he was asked if he had ever been arrested before and he said he was arrested for gambling and unlicensed driver.

Q When in relation to the administration of the rights that Mr. MacBeth gave him was this question about Mr. Payden's arrest record, before or after?

A It was after he was advised of his rights.

Q Was it before or after, as you say, he was shown a copy of the indictment?

A I believe it was after.

Q The questions about the arrest came after he was shown a copy of the indictment?

A Yes, they were, because he was given time to read. It was a lengthy thing he had to read and he was given time to read it.

Q Can you tell me then the sequence, as best you can recall, from the time you entered the room, not specifically, not each question, but how it went?

A He was brought into the office. He was advised of his rights. He was given a copy of the indictment and he was questioned.

Q Was it right after that Mr. MacBeth admonished Mr. Payden that if he didn't have funds, an attorney would be appointed for him, that Mr. MacBeth had asked

Mr. Payden whether Mr. Payden wished to answer questions concerning his background?

A I don't recall. I don't understand your question.

Q Do you recall at one given time Mr. MacBeth advising Mr. Payden that if he couldn't afford an attorney, one would be appointed for him by the Court?

A Yes, I do.

Q Do you recall whether or not Mr. MacBeth when he asked that question, ever indicated that Mr. Payden could have that attorney at that particular moment?

A Yes, he did.

Q Was he reading from a piece of paper when he said that?

A I don't recall.

Q Was Mr. MacBeth reading from this piece of paper that I was given?

A Yes.

Q Did he read it word for word?

A I couldn't see the paper, I don't know.

Q Have you seen these papers before?

A Yes, I have.

Q After that Mr. Payden was asked questions about his age and date of birth and things like that?

A Yes.

Q Were those questions you had previously asked of Mr. Payden?

A Were they previously asked?

Q By yourself?

A I haven't talked to him at all.

Q Did anybody prior to Mr. MacBeth seeing Mr. Payden process Mr. Payden?

A Yes.

Q Who was that?

A Special Agent Magnom.

Q And have you processed prisoners before?

A Yes.

Q Are those questions pertaining to arrest records, date of birth, those types of questions that are asked of a processed prisoner?

A Date of birth, yes. Ever been arrested before, no.

Q You don't ask that.

When you say an indictment was shown to Mr. Payden, was that the whole indictment?

A There were a number of pages, yes.

Q How did that indictment come to be photostated?

A Mr. MacBeth photostated the indictment.

Q In his room?

A Outside.

Q He left the room?

A Yes.

Q Is it your testimony before that no one left the room?

A I also said that Mr. MacBeth Xeroxed it before.

Q And he came back with an indictment in his hand?

A Yes.

Q What was the first question asked of Mr. Payden when Mr. MacBeth returned?

A He was given the copy of the indictment.

Q It was handed to him?

A Handed to him.

Q What was said at that point?

A I don't recall. Something to the effect here is a copy of the indictment, this is what you are being charged with.

Q What was said after that?

A I don't recall. Mr. Payden read it, read the indictment.

Q Do you mean he had the indictment in front of him and he started turning pages?

A Right.

Q Did he reach the last page of the indictment?

A Yes, I believe so.

Q How long did it take him to read?

A Five minutes.

Q Excuse me?

A Five minutes.

Q After he completed reading it, what was the next question asked, if any?

A I don't recall.

Q What was said after that?

A By who?

Q By anyone?

A Mr. Payden said he didn't kno anybody involved in the indictment.

Q Was that in response to a question?

A No. He just said he didn't know anybody.

Q That was his words, he didn't know anybody?

A He didn't know anybody involved with the indictment, something to that effect.

Q Was he asked about the name of Billy Vernon?

A No.

Q Was the name Lester or David Bell mentioned?

A No.

Q Was the name Jackie Smith or Jane Doe Jackie Smith mentioned?

A No, sir.

Q He just said he didn't know anybody in the indictment?

A Yes.

Q What happened at that point?

A I don't recall.

THE COURT: You know, you are going beyond the scope of the question whether he was advised of his rights and whether the statement was voluntary. There hasn't been any objection but there comes an end to it. You are cross examining beyond what was said.

MR. GOLDBERG: May I have just one moment, your Honor.

Q Had Mr. Payden indicated to you that he wanted to speak to Mr. MacBeth at any time?

A No. He didn't indicate one way or the other.

Q Where was Mr. Payden before you took him to Mr. MacBeth's office?

MR. MAC BETH: Objection.

THE COURT: Sustained.

Q Did anybody advise him of hss rights at an earlier time?

MR. MAC BETH: Objection.

THE COURT: Sustained. All we are concerned with is the statement before Mr. MacBeth, nothing else.

MR. GOLDBERG: If in fact on a prior occasion that day he had been informed of his rights and said he didn't want to make any statement.

THE COURT: When did you see him?

THE WITNESS: That morning.

THE COURT: Wht time?

THE WITNESS: Maybe 11:30, approximately 11:30.

THE COURT: Did you have any discussion with him then?

THE WITNESS: I didn't talk to him at all.

THE COURT: And you took him right to Mr. MacBeth's office?

THE WITNESS: Yes.

Q Was he in custody of another officer when you saw him?

A No, he wasn't. He was in the correction facility, the holding pen.

Q Without a word, you took him up to Mr. MacBeth's office?

A Yes, sir.

MR. GOLDBERG: No further questions.

THE COURT: Do you have anything further?

MR. MAC BETH: No.

THE COURT: W can't resolve this matter but

we can resolve the witness' testimony before this jury at least of the other part.

MR. MAC BETH: Yes.

THE COURT: Bring in the jury.

You will have to reswear this witness in front of the jury.

(Jury present.)

M Y L E S H A R R I N G T O N, called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MAC BETH:

Q How are you employed?

A Police officer assigned to the New York Drug Enforcement Task Force.

Q How long have you been employed by the New York City Police?

A Nine and a half years.

Q How long have you been assigned to the Drug Enforcement Task Force?

A Just over two years.

Q Turning your attention now to October 30th of this year, could you tell the jury what if anything you did in connection with this case on that date?

A I delivered the evidence in the case from the

regional laboratory at 57th Street to you.

MR.MEYERS: To save time, may I interpose a general objection to any conversation pertaining to Mr. Payden that was obtained after the alleged conspiracy alleged terminated --

THE COURT: All this witness testified to is that he took certain exhibits.

Show them to him.

Q I show you what has been marked Government's Exhibit 1, 2 and 3 for identification.

THE COURT: Where did you get those?

THE WITNESS: At the regional laboratory on 57th Street.

THE COURT: What did you do with them when you got them there?

THE WITNESS: I delivered them directly to Mr. MacBeth.

THE COURT: October 30, 1975?

THE COURT: Yes.

THE COURT: You delivered them in the same form in which you received them?

THE WITNESS: Yes.

THE COURT: After that, you had nothing to do with them?

THE WITNESS: That is right.

MR. MAC BETH: No further questions.

THE COURT: Any cross examination?

MR. GOLDBERG: May I ask him a question not discussed on direct examination?

THE COURT: Ask him the question.

CROSS EXAMINATION

BY MR. GOLDBERG:

Q Officer Harrington, on August 6th were you working with Officer Herilhy?

MR. MAC BETH: Objection.

THE COURT: I will permit it.

A August 5th? I have to look at the record, counselor.

Q I don't know if this will help you. This is Officer Herlihy's.

THE COURT: What number is that document?

MR. GOLDBERG: 3503.

A Yes, I was on surveillance that night.

Q Were you in the same car as Officer Herlihy?

A I don't recall, counselor. I don't recall whether I was or not. My name is up at the top.

THE COURT: That doesn't refresh your recollection?

THE WITNESS: I remember being there but I don't recall if I was in the same car that night. There were a number of cars out on patrol.

MR. GOLDBERG: No further questions at this time.

MR. MAC BETH: No redirect.

THE COURT: Would you go back to the witness room, please.

(Witness excused.)

THE COURT: Members of the jury, I don't like to have you walk in and out of here but sometimes it is necessary. Would you mind if you went back to the jury room for just a few minutes, please.

(Jury leaves courtroom.)

THE COURT: How soon could you possibly get Mr. Finger here?

MR. GOLDBERG: Your Honor, we had that conference with Judge Conner. I am sure it was concluded.

THE COURT: Where is the office?

MR. GOLDBERG: Sixth Avenue and Eighth Street.

THE COURT: Is there any other witness you can produce?

MR. GOLDBERG: I would call Mr. Payden.

THE COURT: Where is Mr. Harrington going?

If you had made this known to me, we could have done this before we resumed at 2:00 o'clock. I fugured we had one witness and I don't want to interfere with his vacation, he is going away and I want to see what we can do about it.

MR. MAC BETH: I wasn't informed by Mr. Goldberg of his objection otherwise I would have conferred with Mr. Bannigan and cleared it up. The affidavit in support of this simply said that Mr. Payden didn't remember being informed of his rights. I thought that was the issue of the affidavit and it seemed to me that was the only issue, Mr. Harrington, was Mr. Payden informed of his right . If we had an affidavit from Mr. Finger --

MR. GOLDBERG: If that can sufficie, we can certainly have that affidavit.

MR.MAC BETH: I am only explaining why.

THE COURT: I am irritated that Harrington is going on vacation and we may have to get him back. It may be a false exculpatory statement which can be considered by the jury and the appropriate instructions. That is the only reason for getting it in and the only question is, had he retained counsel or had counsel been retained and directed that he not be interrogated prior to it. That is all that is involved.

MR. MAC BETH: I appreciate that and it is

simply that I wasn't aware that was Mr. Goldberg's point.

MR. GOLDBERG: Your Honor, I wasn't on notice as to what either until Mr. Finger told me look at the file, dummy and that is when I noticed it for the first time.

THE COURT: Do you have any indication what time you can talk to Bannigan? He must be upstairs.

MR. MAC BETH: I can try and call Bannigan right now.

(Pause.)

MR. MAC BETH: He left for a meeting in Washington at the end of the morning and he has returned.

THE COURT: Where is Officer Harrington going to?

MR. MAC BETH: I think it is upstate New York. I can check.

(Pause.)

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MR. MacBETH: Otsego County, your Honor. That is about four hours from here.

THE COURT: Oh, that is not fantastic. I don't like to bring him back, but I think we may have to, the way it looks. All right. Maybe we can do this the first thing on Monday morning.

How much longer is your case going to take?

MR. MacBETH: We have two more witnesses, your Honor.

THE COURT: In other words, you will be resting around noon on Monday?

MR. MacBETH: I would think so.

THE COURT: You don't have to extend me the courtesy of telling me whether you have any witnesses, but you can tell me how long your case is going to take, Mr. Meyers. How long is your case going to take?

MR. MEYERS: That depends on your Honor ruling on the request I'm going to make to examine the so-called confidential informant.

THE COURT: I told you that he is available to you. You know his name and his address. We will issue a subpoena if you want him subpoenaed.

MR. MEYERS: We are going to try to subpoena him, if we can, over the weekend and bring him in possibly

on Monday.

THE COURT: Does the Government have any opportunity to make him available?

MR. MacBETH: If anyone knows where he is precisely, it would be the Probation Department, which is not an arm of the executive branch of the Court. I asked Mr. Timbers if he knew where he was and I asked the agents. And apart from the general statement that was in the affidavit from Mr. Harrington, neither the agent nor Mr. Timbers--

THE COURT: So that he is not under your control.

MR. MacBETH: He is certainly not under our control. They obviously know his whereabouts.

THE COURT: They knew his address, which they had known, I gather, before we started here, or at least after we started.

MR. GOLDBERG: Your Honor, I have another application which may directly bear on the length of this trial.

In looking at the DEA 6's, I see here that there are two files that indicate some connection between Mr. Payden and CT72-0123 and CT73-1207, which indicate to me to be some file. We ask to see that file that pertains to Mr. Payden, in order to make an educated decision.

MR. MacBETH: The Government objects, your Honor.

THE COURT: Yes. The Government is only required to furnish you with Brady material and Jencks material. Let's have the jury in. We will dismiss the jury for the day.

I would hope to have the requests to charge of the defendants by Monday morning.

MR. GOLDBERG: Your Honor, I can have that for you by--not exactly 9:00, but I would have it for you by 11 or so.

(The jury entered the courtroom.)

THE COURT: I regret that I had to parade you in and out, but it had to do with the availability of a certain witness, and that was the reason for it. I thought that perhaps the possibility was that the witness would have been on this afternoon, but that is not going to be happening and I just wanted to check that out. That is why I had to have you go in and out a couple of times. I'm sorry to have to do that to you.

We are going to adjourn for the day, to resume at 9:30 on Monday morning. I have a short matter on for 9:30 on Monday morning. Hopefully it will be short, that the lawyers won't talk too much on it, and we can get started shortly after 9:30.

We won't be together for over 48 hours, I guess

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it is, and in that time you will probably run across more people than you have seen since you were selected to serve on this case yesterday, and you will have more opportunity to talk to outsiders. I want you to keep it in mind constantly not to talk to anyone, don't talk about it over the weekend to anybody, and don't let anybody talk to you.

There is some expectation I believe that the case will be submitted to you sometime during the early part of next week, and when you are in the jury room you will have ample opportunity to discuss it, when the time comes for you to discuss it, after you have heard all the testimony and been instructed on the law.

Have a pleasant weekend and we will see you here at 9:30.

(The jury left the courtroom.)

MR. MacBETH: Mr. Goldberg has asked to have various agents available in the course of the last couple of days. I want to ascertain whether it is necessary to have them available on more than a few hours' notice.

MR. GOLDBERG: No. I never intended that they wait outside the courtroom. If you can reach them on short notice, that's all right.

MR. MacBETH: They can be reached on a few hours' notice. Some of them are in New Jersey and some further

eljb 5 Harrington

away.

THE COURT: You are going to finish your case on Monday. Maybe at the luncheon recess--

MR. GOLDBERG: I can say this, your Honor. The first witness I want to call is Officer Herlihy.

THE COURT: Monday morning, gentlemen.

(Adjourned to Monday, November 17, 1975, at 9:30 a.m.)

oOo

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Name	Direct	Cross	Redirect	Recross
Chris Jackson (Resumed)		79	158	161
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UNITED STATES OF AMERICA

V. 75 CR. 421

DONALD PAYDEN, a/k/a COUNTRY,
and BILLY VERNON

November 17, 1975
10:15 a.m.

oOo

(In the absence of the jury.)

MR. MacBETH: The Government will not pursue the issue of the false exculpatory statement any further.

THE COURT: All right.

MR. GOLDBERG: Your Honor, on Saturday at 12:00 noon at the premises of--it was just with regard to the services of a subpoena, your Honor. But since they haven't finished their case, the only reason why I mentioned it now is that the subpoena was--the law was supposed to have been here today at 10:00 a.m. It was on my personal service; I served him personally.

THE COURT: All right. Are you ready?

MR. MacBETH: Yes, your Honor.

THE COURT: Bring the jury in.

MR. MacBETH: Shall I bring the witness in?

THE COURT: Yes. Put the witness on.

(Jury present)

MR. MACBETH: The Government calls David W. Major.

D A V I D W. M A J O R, called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MACBETH:

Q Agent Major, how are you employed?

A Special agent employed by the Drug Enforcement Administration, assigned to the New York Drug Enforcement Task Force.

Q How long have you been employed with the DEA?

A Six years and five months.

Q Turning your attention to August 7, 1974, were you on duty at that time?

A Yes, I was.

Q Where were you on duty on that day?

A I was on duty near 116th and Lenox Avenue, New York City.

Q What time of the evening did you arrive there?

A Approximately 5:25 p.m.

Q What did you see at the time you arrived there?

A Nothing at that time.

Approximately 5:50, an undercover officer, Police

Officer Chris Jackson arrived in an undercover car and parked in the block of 116th Street between Lenox and Seventh Avenue.

Q What, if anything, did you see Officer Jackson do after he parked the car?

A I had no direct observation of him after he parked the car.

Q Did there come a time when you saw that car leave the block?

A Yes, sir.

Q Where did you see the car go?

A The car left and proceeded west on 116th Street and myself and another officer initiated a moving surveillance of the car. We followed it to Seventh Avenue, then north on Seventh to 145th, then over to -- on 145th Street over to Broadway.

MR. GOLDBERG: I didn't hear that.

A We followed it north on Seventh Avenue to 145th, and them west on 145th to Broadway, then the vehicle was parked on Broadway at 148th Street.

Q What, if anything, did you see after the car stopped at 148th Street and Broadway?

A At that time I was a couple of blocks behind the car. It pulled over. I didn't see any other activity until

it left.

Q Did you see the car leave 148th Street?

A Yes.

Q Where did you see it leave to?

A It proceeded north up to 151st or 152nd Street, made a U turn on Broadway and proceeded back to about 150th Street and Broadway, then pulled over again on the right-hand side of the street and stopped momentarily.

Q Where were you in relation to the car when it stopped on 151st Street and Broadway?

A Perhaps a couple of blocks behind it.

Q What, if anything, did you see when the car stopped at that location?

A Again I pulled over to the right-hand side of the street. I didn't have direct observation of the occupants at that time.

Q Did you see the car leave that location?

A Yes, sir.

Q Where did the car go from there?

A It proceeded to 145th Street south on Broadway, then made a left-hand turn. It was driven east on 145th Street to Club 356-1/2 West 145th Street and it parked on the south side of the street facing east, about 145th and Edgecombe.

Q What did you do after you saw the car parked there?

A I set up a surveillance on 145th Street, just west, about a half-block west of St. Nicholas.

Q When you say set up a surveillance, will you describe to the jury what that involved?

A Yes, there were a number of surveillance officers. Some of us -- excuse me. In some cars there was just one agent. Other cars there were two surveillance officers. There were three or four surveillance cars and we set up the surveillance in the vicinity of the undercover car and in this case we had a black detective, Detective Wright. We tried to get him as close to the scene as possible.

MR. GOLDBERG: Objection.

THE COURT: Sustained.

Q How long were you in this surveillance setup?

A At this time after the car parked?

Q After the car parked.

A Before it moved?

Q Before the next move.

A About 25 minutes.

Q When the car moved, where did you see it go?

A It made a right turn on Edgecombe Avenue. I followed it and as I turned right, turned south on Edgecombe

Avenue, the undercover car was in the middle of the block and it pulled over and I saw another surveillance vehicle was behind it and, as I turned into the block, the undercover car with Police Officer Jackson was leaving, so I followed it around the block and the vehicle was set up in approximately the same position, so I initiated my surveillance in the same area that I had been previously before.

Q What did you do after you set up your surveillance there for the second time?

A I stayed there until I was requested to drive by the area.

Q Did you in fact drive by the area?

A Yes, sir.

Q What time was this?

A A little after 7:00, approximately 7:10, 7:13 p.m.

Q How long was it after you set up your second surveillance?

A 23, 24 minutes.

Q As you drove down the block on 145th Street, what did you see?

A I saw one black male near the club at 356-1/2 West 145th, and the undercover officer and another black male about 20 steps or 30 steps east of them, east of this other black male, on the sidewalk, and when I drove by, the

undercover officer, Chris Jackson, was handing money to the one black male.

Q How close were you to Officer Jackson at the time you saw him handing this money?

A While I was driving by, I was on the eastbound lane. Maybe 30, 35 feet.

Q Could you describe the manner in which the money was being handed by Officer Jackson?

A Yes. He was facing the individual and it appeared to me he was counting out money to him. It was just like an exchange between the two of them. They were facing each other and one was handing the money to the other.

Q After you had driven down the block at that time, did you see Officer Jackson or that black male again in the course of the next hour?

A No, sir.

MR. MACBETH: No further questions.

MR. MEYERS: No cross examination.

CROSS-EXAMINATION

BY MR. GOLDBERG:

Q Officer Major, what type automobile were you operating on August 7th?

A '71 Mercury Montego.

Q Was anybody besides yourself in that automobile?

A No, sir.

Q Do you recall what type automobile Officer Jackson was operating that day?

A Yes, sir.

Q What was it?

A A '71 Cadillac sedan DeVille.

Q You had met your surveillance team sometime earlier that evening?

A Yes, sir.

Q Where did that meeting take place?

A At that time I think we just left from the office. I am not sure if we had a meeting before or after we left.

Q You say you left from your office. Where is your office?

A 201 Varick Street.

Q Did you have a meeting with Group 9 at that Varick Street location?

A Yes, sir.

Q Did you all formulate a plan that day with regard to the surveillance you were going to make?

A Yes, sir.

Q Did you know who was involved in that surveillance or who was involved in Group 9 on that particular day?

A Yes, sir. Detective Herbert Wright and Detective

Stephen DelCorso, Police Officer John Crowe, Police Officer Miles Harrington, Police Officer Vance Herlihy, myself. I think that is all.

Q As you recall that day, did you leave the Varick Street location with your team or about the same time your team left?

A Yes.

Q Did you all get in your respective surveillance automobiles?

A I believe so, sir.

Q Did you know what automobile Officer Herlihy was operating that day?

A Yes, sir.

Q What kind of car was he operating?

A A '71 Pontiac LeMans.

Q Officer Wright?

A I believe it was a '71 Matador.

Q Would it be fair to state you were aware of the model or type or year of those automobiles operated by members of your surveillance team that date?

A Yes, sir.

Q If you saw one of the other automobiles, you would recognize it to be the type of model vehicle that was used in this operation?

A Excuse me?

Q If you saw that vehicle, the vehicles driven by one of the members of your group, you would recognize it, would you not?

A I would think so.

Q Did you see the pistol or revolver carried by Officer Jackson on 8/27/74?

A No, sir.

Q Do you know what pistol he carries, what type of pistol?

MR. MACBETH: Objection.

THE COURT: Sustained.

Q Was there, to your knowledge, any monitoring equipment within Officer Jackson's car that day?

MR. MACBETH: Objection.

A No, sir.

MR. GOLDBERG: I will withdraw the question.

Q Did you see anybody place any recording or monitoring equipment in Officer Jackson's automobile, the '71 Cadillac?

A No, sir.

Q Did you receive any communications whatsoever from Officer Jackson directly on 8/27/1974?

A Not directly, no.

Q You say on that date you first went to 116th Street and Lenox Avenue?

A Yes, sir.

Q And you arrived there at about 5:25 p.m.?

A Yes, sir.

Q Did you see at that location any vehicle driven by members of your group?

A I can't recall, sir.

Q After leaving 116th Street and Lenox Avenue, did you ever go back to that location or that vicinity sometime later that evening?

A Which location?

Q 116th Street and Lenox Avenue.

A Yes, sir.

Q What time did you arrive at that location?

A Approximately 8:00 o'clock.

Q Incidentally, you didn't testify in the grand jury, did you?

A I can't recall. I don't believe so.

Q When you arrived at 8:00 o'clock, back in the vicinity of 116th Street and Lenox Avenue, did you make any observations at that time?

A No, sir.

Q Did you see that that location again sometime

after 5:25 p.m. the '71 Cadillac driven by Officer Jackson?

A Yes, sir.

Q What time was it?

A When I came on the scene the car was already there.

Q In other words, you are saying at about 8:00 o'clock the car was there, or about 5:25 it was?

A About 8:00 o'clock.

Q Between the time you say you made this observation at 356-1/2 West 145th Street, and your eventual return to Lenox and 116th Street, where did you go?

A Attempted to locate the '73 Mercedez.

Q How long did you go about attempting to locate that vehicle?

A I met with another officer, Police Officer Crowe, who had been following that vehicle.

Q You say following that vehicle; did he tell you he had been following that vehicle, or did you see him following that vehicle?

A I heard over the radio. I was in communication with him.

Q When you received that communication, where was your automobile?

A I was paralleling Mr. Crowe on police surveillance.

I didn't have him in sight or the vehicle in sight. I was about four blocks east of St. Nicholas Avenue and I ran into the end of a park.

Q You were about four blocks east of St. Nicholas?

A Proceeding north.

Q On what street were you proceeding north?

A I can't recall. I know there is a park that separates the street, and from where I ended up, I couldn't go over to St. Nicholas Avenue.

I am not really familiar with that area.

Q You said you were proceeding north on, I would take it, a north-south street, four blocks east of St. Nicholas Avenue?

A It might have been just the northbound street.

Q What?

A It may not have been a north-south street; it may have been a northbound street.

Q It was a street that, in any event, faced in two directions?

A Yes.

Q Did you see on that street any surveillance vehicles?

A No, sir.

Q When you received this communication pertaining

to the Mercedes, where did you go?

A I met with Police Officer Crowe.

Q Where did you meet Officer Crowe?

A I think it was on -- I am not positive. It was either in the Bronx, close to the Harlem River Drive area, or it was in Manhattan on the Harlem River Drive area near St. Nicholas.

Q Do you recall crossing any bridges?

A I believe we had. I believe it was in the Bronx.

Q Excuse me?

A I am sorry.

We met, I believe, in the Bronx, I am not certain, and we discussed what had happened.

Q Do you recall where in the Bronx you met Officer Crowe?

A No.

Q When you met Officer Crowe, where did you proceed, if anyplace?

A After meeting with him, we proceeded back to 116th and Lenox.

Q How long after your last observation or when you saw this Mercedez -- did you see the Mercedez on 145th Street?

A I certainly did.

Q How long after you saw this Mercedes on 145th

Street did you reach 116th Street and Lenox Avenue?

A Approximately 45 minutes.

(Continued on next page)

Q How much time after you met Officer Crowe did it take you to reach 116th Street and Lenox Avenue?

A 15 minutes, approximately.

Q When you arrived at 116th Street, where did you park you automobile?

A I believe I parked it on Lenox between 115th and 116th facing north.

Q From that location were you able to see a bar?

A No, sir.

Q Had you been at any time prior to August 27th in the vicinity of a bar on 116th Street?

A Excuse me, sir?

Q Prior to August 27th was your attention ever directed at a bar that was on 116th Street?

A Yes, sir, it was.

Q Do you recall on that prior occasion what the name of the bar was?

A Jimmy Daniels.

Q On this occasion, on August 27th when you went to 116th and Lenox, would it be fair to state that you set yourself up or positioned your automobile in such a way as to prevent you from seeing that bar?

MR. MacBETH: Objection, your Honor.

THE COURT: Yes, sustained.

Q How far was the bar in relation to where you parked your automobile on August 27th?

A The bar is on Lenox Avenue, it's on the south side of the street between Lenox Avenue and Seventh Avenue, but closer to Lenox Avenue.

Q You say the bar is on Lenox Avenue?

A No. I said the bar was on 116th Street between Lenox and Seventh, but it's on the south side of the street and it's closer to Lenox Avenue.

Q Where did you position your automobile in relation to that bar?

A On Lenox Avenue I think it was between 115th and 116th. Could have been between 114th and 115th, but it was on Lenox Avenue around the corner from the bar.

Q So it would be fair to state that from your position you could see Lenox Avenue?

A I could see Lenox Avenue.

Q But you could not see around the corner, so to speak, to Jimmy Daniels Bar?

A That's correct.

Q Did you see at any time while you were positioned on Lenox Avenue, that Mercedes on or about 8:00?

A No, sir.

Q Did you see this gentleman, indicating the

defendant Payden, at any time about 8:00?

A No, sir.

Q Would it be fair to state that you didn't see in effect anyone enter or arrive at that bar at about that time?

A No, I did not see.

Q Were there any other agents aside from yourself in vehicles in the vicinity of 116th Street and Lenox Avenue on August 27th?

A Yes, sir.

MR. MacBETH: I object.

THE COURT: No, I will permit it.

Q Who were those agents or what vehicles were so-positioned?

A I believe it was Detective Wright, was in the vicinity of the bar, and the next surveillance vehicle, it was either one of two. It was either Police Officer Merlihy or it was Detective DelCorso and Police Officer Harrington together. But it was one of those two latter two that were in the area, that had a direct visual of the bar.

Q So to the best of your recollection would it be fair to estimate that there were at least three vehicles three surveillance vehicles, aside from the undercover

vehicle at about 8:00?

A No, sir. Two.

Q Two? Your vehicle?

A No.

Q You are not counting your vehicle?

A I'm not counting my vehicle.

Q But you would count, however, Detective Herlihy's vehicle and Police Officer Herlihy?

A Yes.

Q And Police Officer Wright?

A Detective Wright.

Q Detective Wright. And Detective DelCorso, was he with Officer Herlihy?

A No, sir.

Q Did you see their vehicles and where they were situated in relation to Jimmy Daniels Bar on 116th Street?

A No, sir.

Q Were they on 116th Street, if you know?

A I'm not certain. I believe so.

Q You believe so?

A Yes.

Q Do you recall in the course of this investigation whether or not any of these officers were positioned on 116th Street, observed that Mercedes?

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MR. MacBETH: Objection.

THE COURT: Yes, sustained.

Q Were you told at any time that they saw a Mercedes at 116th Street between Lenox and Seventh Avenue?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q How long have you been assigned to this office in connection with this proceeding?

A Excuse me, sir? With this case?

Q Yes. For the trial itself; I'm not talking about what transpired earlier.

A I'm sorry, I didn't get your question.

Q How many times have you spoken to Mr. MacBeth in connection with this case?

A Two or three times.

Q And have you discussed with him the facts that you told this Judge and jury?

A Yes, sir.

Q Did you have to review any notes or memoranda?

A Yes, sir.

Q Was that memorandum you reviewed your daily activity report for 8/27/74?

A I believe so.

Q Were there any other notes aside from that daily

activity report that you reviewed in connection with this case?

A Yes, sir.

Q What other notes?

A The case file of this inve igation.

Q Those weren't your notes?

A No, they were not.

Q What other notes aside from the case file and aside from your daily activity report did you review?

A That's all.

MR. GOLDBERG: I think we ought to mark this. It hasn't got a number, your Honor.

(Defendant Payden Exhibit C marked for identification.)

Q Looking at your daily activity report does that refresh your recollection as to the incident involving a gun that occurred on August 27, 1974?

A Yes, sir.

Q What portion of that activity report does so?

MR. MacBETH: Objection, your Honor.

THE COURT: Yes, sustained.

Q Is there anything on that activity report that refreshes your recollection about following at any time a Mercedes on that day?

A Of course not.

Q Of course not?

A That's right.

Q Did you follow a Mercedes on that day?

A Did I follow the Mercedes?

Q On that day?

A On the 27th?

Q Yes.

A I certainly attempted to. I guess you would consider that a yes.

Q Did you see that Mercedes at any time being operated on that day, in other words, moving?

A No, I didn't.

Q When you say that you made an observation while going east on 145th Street with respect to two individuals engaged in conversation and tendering money or counting money, was your vehicle moving?

A Yes, it was.

Q Was this incident that you observed on the sidewalk?

A Yes, it was.

Q Were there vehicles parked along the curb?

A Yes, there were.

Q Where in relation to Edgecombe Avenue, or how

far from Edgecombe Avenue would you say that this money transfer or payment took place?

A Very close to Edgecombe Avenue.

Q When you say very close, what would that approximately be?

A 10 or 20 feet from the intersection.

Q 10 or 20 feet from Edgecombe, from the building line along Edgecombe Avenue, would that be a fair statement?

A I'd say from the end of the sidewalk, from the street.

Q How far was 356-1/2 West 145th Street from the place you say you observed that?

A Maybe 35 feet; not more than 40 feet.

Q Excuse me?

A Not more than 40 feet west.

Q When you made this observation, you say you saw two people, one of whom was Officer Jackson?

A That's right.

Q Were there any other individuals in that general vicinity along Edgecombe Avenue at that time?

A Yes, there were.

Q How many?

A There is the undercover officer, Police Officer

Jackson, and the other black male, and there was another black male near the entrance to 356-1/2--not near the place, on the sidewalk, close, parallel to 356-1/2 West 145th Street. There may have been a few more other black males in the area, I'm not certain.

Q You are not certain?

A No. I mean I don't think--they were not the only three people on the sidewalk, but I can't recall how many other people were there, because I was concentrating my attention just on those subjects.

Q An what subjects?

A Mr. Jackson and the other individual.

Q When you say concentrated your attention on those subjects, would it be fair to state that you saw these subjects only while your vehicle was moving?

A That's correct.

Q Had you seen any of these subjects aside from Mr. Jackson, any other date?

A Yes, sir.

Q When was that?

A I saw one on August 6th.

Q And the other?

A Prior to that--the other on that day.

Q On what day?

A August 27th.

Q In other words, one subject you had never seen prior to August 27th?

A That's correct.

Q Personally?

A That's correct.

Q That subject that you had previously not seen in person, but you did see on August 27th, do you see him in Court?

A Yes, I do.

Q I would take it that you are referring to Mr. Payden?

A Yes, sir.

Q At the time you saw Mr. Jackson engaged in some activity on Edgecombe Avenue, where was Mr. Payden?

A Standing on the sidewalk.

Q Where?

A He was--about 30 feet west of Mr. Vernon and Police Officer Jackson.

Q In other words, Mr. Payden was between 356-1/2 West 145th Street and Edgecombe Avenue?

A Yes.

Q Under those circumstances was he on the right, or to the east?

A No--

Q Or to the west of that location, west of 356-1/2 West--

THE COURT: Let's start again.

Q I will withdraw the question.

At any time did you see Mr. Payden between 356-1/2 West 145th Street and St. Nicholas Avenue?

A No, sir.

Q Where when you did make the observation did you see a Mercedes? Where was it?

A I believe it was in front of 356-1/2 West 145th. It was in between Edgecombe and St. Nicholas, but it was like in the middle of the block.

Q Was it parked along the curb or double-parked?

A I think it was parked along the curb.

Q When you say in the middle of the block, you are giving your rough estimate?

A That's correct.

Q By that I take it it wasn't, to the best of your observation, closer to St. Nicholas or Edgecombe, it was fairly in the middle of the block?

A I believe so.

Q Where was the undercover car?

A It was nearer Edgecombe on 145th. It was west

of the Mercedes.

Q East of the Mercedes?

A Excuse me. East of the Mercedes, that's correct.

Q Did you see anybody get out of the Cadillac at that time?

A No.

Q Did you see anybody get into the Cadillac at that time?

A No, sir.

Q Prior to your observing the incident you say occurred near the corner of Edgecombe did you see Mr. Payden at all?

A No. Just on the street, which I had mentioned earlier.

Q Just at that time?

A Yes, sir.

Q You didn't see where he had come from?

A No, sir.

Q But it is your testimony you saw where he went?

A No.

Q You didn't see where he went?

A No.

Q Did you see the Mercedes, anybody get into that Mercedes?

A No.

Q Did you see Officer Wright?

A No, sir.

Q Did you see Officer Herlihy?

A No, sir.

Q Your car, you say, was positioned west of St. Nicholas Avenue?

A Yes, sir.

Q In other words, you were west of 356-1/2?

A Yes.

Q And as a matter of fact, how far between St. Nicholas Avenue and the following westerly street were you?

A In the middle of the block.

Q Would it be fair to state that you were a full block from 356-1/2?

A At least.

(Continued on page 323.)

Q It is your testimony from that position you were able to look across St. Nicholas Avenue and almost look down the next block to Edgecombe?

A If I could see that far, I couldn't see anything.

Q You say you moved your vehicle?

A That is correct.

Q Easterly towards Edgecombe?

A That is correct.

Q Was that pursuant to any signal that you had received?

A Yes, it was.

Q From whom did you receive that signal?

A From one of the surveillance officers.

Q Do you recall who it was?

A No, sir.

Q What was that communication you received.

A That signal was that the undercover officer and Mr. Payden and Mr. Vernon were outside the club. There was some activity going on and if anyone could drive by the area and see what was happening, go ahead and do it.

I was on the same street, St. Nicholas Avenue. They were just down the block from me. I proceeded east and went by the area.

Q Was it dark at that time that you proceeded?

A No.

Q How would you characterize it?

A 7:10 p.m.

Q How would you characterize the lightness or brightness or dusk or what?

A Fairly light. The street lights weren't on.

Q You stopped at the traffic light on St. Nicholas; then proceeded down to 145th Street?

A I can't recall if I stopped at the stop light or not.

Q How fast had you proceeded past the intersection of 145th Street and St. Nicholas? How fast were you going?

A 20, 25 miles an hour.

Q Was there traffic on the street at that time?

A Yes.

Q Heavy, back-to-back traffic?

A Not back-to-back.

Q Were there cars double parked?

A There were some cars double parked.

Q Would you say there was a large amount of people on that southern portion of 145th Street, walking?

A No, sir.

Q Desolate?

A No.

Q Your testimony would be, then, that you drove east on 145th and would it be fair to state you looked out your window when you arrived in the vicinity of Edgecombe Avenue and you saw Mr. Jackson with somebody else?

A No. I didn't look at the window when I was at Edgecombe and 145th. I was looking in that area after I passed St. Nicholas Avenue.

Q What I am saying is, you did look out the passenger window?

A That is correct.

Q You had to do that to make the observation you say you made?

A That is correct.

Q When you did make this observation, where was your automobile?

A Probably east on 145th between St. Nicholas and Edgecombe.

Q Where was it? How many feet was it from Edgecombe Avenue when you first say you made this observation? When you first saw the individuals.

A In the middle of the block between St. Nicholas and Edgecombe on 145th.

Q In other words, you would be almost a half-block away?

A Yes, sir.

Q And you began proceeding at a rate of 20 or so miles an hour until you were adjacent?

A That is right.

Q When for the first time did you see what you believed to be money?

A When I passed Mr. Jackson and Mr. Vernon.

Q Did you have any indication at that time that any money or any transaction was to take place at that area?

A No, sir.

Q You are telling us, coincidentally, as you drove down that street, you saw someone hand money to someone else?

A That is correct.

MR. MACBETH: Objection.

THE COURT: No. He said that.

Q Where were these two individuals positioned when you made that observation?

A Mr. Jackson was facing Mr. Vernon. Mr. Jackson was east of Mr. Vernon and they were both on the sidewalk. One was facing the other.

Q In other words, you were able to see from your position in the car the left profile of Officer Jackson?

A No, of Mr. Vernon.

Q And the right profile of Officer Jackson?

A That is correct.

Q They were standing face-to-face and your vehicle was pulling up along 145th Street?

A That is correct.

Q Were there any other people in that area?

A No, sir.

Q Excuse me?

A Around them?

Q Within a few feet from them.

A They were the only two people.

Q Where was the nearest person from these two individuals when you say you made this observation, if you know?

A Mr. Payden.

Q He was what, some 30 feet away, you said?

A That is correct.

Q What was he doing?

A Standing on the sidewalk.

Q Was he talking with anyone?

A He could have been; I can't recall. He could have been talking to somebody. I am not sure.

Q Let me ask you this: As you proceeded -- you would have had to have passed Mr. Payden?

A That is correct.

Q When you passed Mr. Payden, when you saw Officer Jackson and you say Billy Vernon, did you have occasion to turn around and glance or attempt to observe Mr. Payden?

A Not after I passed him.

Q Did you at any time after you say you saw this transaction turn around?

A No, sir.

Q You kept going?

A That is correct.

Q Where did you go?

A Proceeded east on 145th Street a couple of blocks, made a right turn off of 145th Street, made a U turn, then set back up on the street facing 145th Street for another surveillance.

Q What location did you situate yourself where you attempted to make this second surveillance?

A I can't recall the cross street. It was right off of 145th Street. It was facing -- it was a north-south street, and I was facing north, just south of 145th Street. Perhaps three blocks, four blocks from St. Nicholas Avenue.

Q Did you see that Mercedez pass by that location?

A No, sir.

Q That was the last time you had occasion to see that Mercedez that evening?

A Yes, sir.

Q Can you describe to us exactly what you saw with regard to the person you say you identified as Mr. Vernon and Mr. Jackson, when you say they were posing or standing on the street?

A Yes.

Q What did you see?

A I saw Mr. Jackson appear to me to be counting out money to Mr. Vernon.

Q Did you see where Mr. Jackson got the money from, where he took the money from?

A Of course not.

I saw him handing Mr. Vernon some money.

Q You say he had it in his hand?

A Yes.

Q Up here or here?

A At the waist level, approximately.

Q And he was standing like this counting money?

A Yes, into Mr. Vernon's hand.

Q And he was going (indicating)?

A No, he was handing it to him like this (indicating).

MR. MACBETH: Can we have some description of this on the record?

THE COURT: I don't think it's necessary. I think

the jury can see it.

Q Do you recall how many bills you observed?

A Of course not.

Q Excuse me?

A Of course not.

Q Do you recall how long a period of time you saw Mr. Jackson handing Mr. Vernon money?

A From the length of time it took me to pass him; maybe a second.

Q Did you see how many times during that period Mr. Jackson made a forward motion with his hand?

A At least two times, three times.

Q And you were able to see it was currency?

A Yes.

Q Did you see what was done with the currency after Mr. Vernon you say received it?

A No.

Q You say you followed the Cadillac south on Broadway for a period of time?

A Earlier, yes.

Q That was from a location up around 148th Street?

A Yes.

Q Did you see the vehicle turn at any street?

A Yes, I did.

Q What street did you see it turn on off of Broadway?

A 145th Street.

Q Did you see any other surveillance vehicle at or about the time you observed this vehicle proceeding south on Broadway?

A I am certain I did. I don't know which surveillance vehicles I did see.

Q Excuse me?

A As I testified to earlier, there were three or four surveillance vehicles that day and we were proceeding mainly as a group, and there was one other surveillance vehicle in my vicinity.

Q I am asking you if you know for a fact --

A Which one it was, no.

Q Do you recall seeing any vehicle take a left turn off of Broadway on either 146th or 148th Streets?

A I can't recall.

Q Have you ever taken a turn off of Broadway between 145th and 155th, a left turn?

A Not that I can recall.

Q Do you know whether or not you can take a left turn between those two streets in that direction?

MR. MACBETH: Objection.

THE COURT: I will permit it.

A No, sir.

Q Isn't it a fact from 145th to 155th, if you took a left turn off of Braodway under any one of those streets, there is no through street?

MR. MACHBETH: Objection.

THE COURT: He just said he is not familiar with it.

Q Yes or No?

A I don't know, sir.

Q When you were going east on 145th Street, did you see Officer Wright?

A No, sir.

Q Did you see his vehicle?

A No, sir.

Q Did you see anyone that closely resembled Officer Wright's description?

A No, sir.

Q Did you see his car at any time parked across the street from 356-1/2 West 145th Street?

A Not that I can recall.

Q When you proceeded east on 145th Street just before you say you made this observation near Edgecombe Avenue, did you see Donald Payden?

A Yes, I did.

Q Did you see,at the time you first saw him, where he was with relation to Officer Jackson?

A Yes, I did.

Q Where was he?

A You are talking about the same time that I testified to earlier?

Q Just before the time you say you made the observation near Edgecombe Avenue. As you drove past St. Nicholas east on 145th Street before you reached Edgecombe.

A Donald Payden was on the sidewalk.

Q What was he doing?

A He was standing on the sidewalk.

Q Was he talking to anyone?

MR. MACBETH: Objection. We have been over this.

THE COURT: No.

A I am not certain if he was or not. He could have been talking with somebody.

Q Did you see him talking with Mr. Jackson?

A No, sir.

MR. GOLDBERG: No further questions.

THE COURT: Redirect?

MR. MACBETH: The Government has no redirect.

THE COURT: You may step down.

(Witness excused)

THE COURT: Next witness.

MR. MACBETH: Roger Godino.

R O G E R W. G O D I N O, called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MACBETH:

Q Mr. Godino, how are you employed?

A I am employed by the United States Justice Department, Drug Enforcement Administration.

Q Where are you employed?

A In Manhattan, 57th Street.

Q What is your position?

A I am a forensic chemist.

Q How long have you been employed as a forensic chemist?

A 5-1/2 years now.

Q Would you explain to the jury what it means to be a forensic chemist?

A A forensic chemist analyzes drug evidence and testify in court as to their findings.

Q What is your educational background?

A I have a degree in chemistry from Queens College,

bachelor's degree. I have 12 credits toward my master's at Long Island University. I have completed a six months training program offered by the Bureau of Narcotics and Dangerous Drugs, now known as DEA, Drug Enforcement Administration.

Q Would you describe that six-month training program, what it is you are trained to deal with?

A I am trained to handle and analyze drug evidence as well as how to present myself in court.

Q What has been your experience analyzing drug evidence?

A Excuse me?

Q What has your experience been in analyzing drug evidence? How many pieces of drug evidence have you analyzed?

A I would say about 1500 exhibits.

Q I show you what has been marked Government's Exhibit 1 for identification.

Can you identify what that is?

A Yes. This is one of the exhibits that I analyzed. My name and date on which I opened the evidence is over here.

Q Where did you obtain that evidence?

A It was assigned to me in the laboratory by my

supervisor.

Q You obtained it from the vault?

A Yes. It was assigned to me by my supervisor and the evidence technician gave me the evidence from the vault.

Q After you received it from the vault, where did you keep it?

A I have a box in which I keep evidence while I am analyzing it, and it's under lock and key constantly and overnight, if it stays overnight, I put it in the box, lock it and put it in the vault.

Q When you were finished analyzing it, where did you put the evidence?

A I give it back again to the evidence technician and it's placed in this safe and it's left there until it's needed for court.

MR. MACBETH: The Government offers Exhibit 1.

THE COURT: Any objection?

MR. GOLDBERG: May I reserve?

THE COURT: No.

MR. GOLDBERG: No objection.

THE COURT: Do you object to Government's 2 --

MR. GOLDBERG: I object to that offer of evidence as it pertains to my grounds.

MR. MACBETH: What grounds?

MR. GOLDBERG: The Government has failed to connect that evidence to my client.

THE COURT: I will instruct the jury appropriately at the time of instruction.

I will receive it in evidence. That is a question for the jury to pass on.

All we are doing now is technically admitting it into evidence, and you have no objection on the grounds of a chain?

MR. GOLDBERG: No.

(Government's Exhibit No. 1 was received in evidence.)

THE COURT: Would you testify the same with respect to Government's Exhibits 2 and 3?

THE WITNESS: Yes.

THE COURT: Any objection on that basis?

MR. GOLDBERG: Same objection.

THE COURT: Overruled.

(Government's Exhibits Nos. 2 and 3 were received in evidence.)

MR. GOLDBERG: Your Honor, isn't it my understanding that Exhibit 3 is being offered against my client?

MR. MACBETH: No. Exhibit 3 is not being offered

against defendant Payden. It's offered only against defendant Vernon.

Q Did you carry out an analysis of Government's Exhibit 1?

A Yes, I did.

Q What did you determine to be the nature of Government's Exhibit 1?

A I will refer to my notes.

Q I show you what has been marked Government's Exhibit 3505 for identification. Does that refresh your recollection?

A Yes.

Q Will you tell the jury what you found Government's Exhibit 1 contained?

A It contained cocaine hydrochloride and sugar.

Q What was the weight of the cocaine hydrochloride in Exhibit 1?

A The net weight was 27.2 grams.

Q What was the strength or purity of the cocaine?

A 35.9 percent cocaine hydrochloride.

(Continued on next page)

Q Did you conduct an analysis of Government's Exhibit 2?

A Yes, I did.

Q Can you testify as to the substance that was found in Government's Exhibit 2?

A Yes, I can.

Q Do you need to have your recollection refreshed from that?

A Yes.

Q I show you what has been marked Government's Exhibit 3506 for identification.

A Exhibit 2--

Q Does that refresh your recollection as to the analysis that you undertook of Government's Exhibit 2?

A Yes, it does.

Q What did you find Government's Exhibit 2 to contain?

A Exhibit 2 contains cocaine hydrochloride and sugar.

Q What was the weight of the cocaine hydrochloride in Government's Exhibit 2?

A The net weight was 53.2 grams.

Q What was the strength of purity of the cocaine hydrochloride in Government's Exhibit 2?

A 26.6 per cent cocaine hydrochloride.

Q Turning your attention now to Government's Exhibit 3, did you conduct an analysis of that exhibit as well?

A Yes, I did.

Q Do you need to have your recollection refreshed to testify as to that analysis?

A Yes.

Q I show you what has been marked Government's Exhibit 3511 for identification. Does that refresh your recollection as to the analysis that you undertook?

A Yes, it does.

Q What did you find to be the nature of Government's Exhibit 3?

A Exhibit 3 contains cocaine hydrochloride, lidocaine, borates and sugar.

Q What was the weight of cocaine hydrochloride which you found in Government's Exhibit 3?

A The net weight of the exhibit was 55.5 grams.

Q What was the strength of purity of the cocaine in that exhibit?

A Excuse me?

Q What was the strength of purity of the cocaine in that exhibit?

A 5.1 per cent cocaine hydrochloride.

MR. MacBETH: The Government has no further questions of this witness, your Honor.

MR. MEYERS: No cross examination.

CROSS EXAMINATION

BY MR. GOLDBERG:

Q Mr. Godino, in your study of chemistry did you have occasion to study measurements, the way a chemical is measured?

A Yes.

Q Have you ever heard the term grain?

A Yes.

Q Have you ever heard the term gram?

A Yes.

Q If I were to tell you that an officer testified in this case that a certain number of grams make--

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Quantitatively, which is larger, a grain or a gram?

A Well, it all depends which system.

Q Would one grain be--

MR. MacBETH: I object, your Honor.

THE COURT: Can you answer that yes or no?

THE WITNESS: I'm not sure what he is trying to

ask me.

THE COURT: He said quantitatively which is larger, the gram or the grain?

THE WITNESS: I don't know.

Q Do you know how many grams make an ounce?

A 28.5 grams. I'm not familiar with grains.

Q 28.5 grams make an ounce?

A Yes.

Q Exhibit 1, how many grams is that, gross?

A Grams?

Q Grams.

A 59.6 grams.

Q So it would be fair to say that was two ounces?

A Gross weight.

Q Gross weight.

A It's almost two ounces. A little under two ounces.

Q Almost two ounces. Now we are referring to--

A 59.

Q Yes, 58.8.

A That is almost two ounces.

Q Exhibit 2, how much was that?

A That is gross weight 78.8 grams and that is over 2-1/2 ounces.

Q And Exhibit 3?

A The gross weight was 81.1 grams and that is over 2-1/2 ounces.

Q 81.8 or 79.7?

A 81.8 grams is gross weight.

Q Of Exhibit 3?

A Yes. That is what I weighed.

Q In other words, on the three occasions, the first chemical or first compound you analyzed, would there be almost two ounces?

A That is in gross weight.

Q When you say gross weight, you are talking about the substance itself?

A No. The weight of the powder is the net weight. The gross weight is the weight of the powder plus the container.

Q In other words, you weighed that and you weighed the tinfoil containers?

A Yes.

Q What was the net weight?

A The net weight of Exhibit--

Q 1.

A Exhibit 1 was 27.2 grams.

Q Less than an ounce?

A It's under an ounce, yes.

Q If I told you that approximately 455 grains make one ounce, or approximately 455 grains make one ounce, would that refresh your recollection as to the quantity of a grain in its relation to an ounce?

A Well, I don't deal with grains and if I would need to know that, I would have to look it up. I wouldn't know if what you say is true. I don't deal with that every day. I am mostly using pharmaceutical measurement.

Q What type of measurement is a grain?

A A gram is--

Q Grain, g-r-a-i-n.

A It's mostly used in pharmacies and the pharmaceutical industry.

Q Do you recall in studying chemistry, ever being given the definition?

A I can look it up. I don't use it on a day-to-day basis and I have no need to know this information.

Q You filled out a DEA 7 form?

A Yes.

Q Were you responsible for the typing of that report or did you just have a report in front of you which you signed?

A I fill out a work sheet and the secretary types

it up and gives it back to me. I review the DEA 7 for typographical errors, and then I sign off on it.

Q Would it be fair to state that with the notes given you, you completely fill out this form?

MR. MacBETH: Objection, your Honor.

THE COURT: Yes, sustained.

A Well, I have--

THE COURT: No, don't answer.

THE WITNESS: Excuse me.

Q Would it be fair to state that as a result of information you received from the person or persons bringing the contraband to your laboratory, you fill out this report?

A I fill out the bottom half of the report as a result of my analysis and from here down, depending on what my analysis was, I have this typed out.

Q When you fill out the bottom portion of that report, is the top portion filled out already?

A Not by me.

Q But is it filled out?

A Yes. It's received, the first half is completed and it is received in the lab that way.

Q Do you have a copy of the DEA 7 on you?

A Yes.

Q For August 6th?

A August 16th--

Q 6th.

A Yes, on here it says August 6th.

Q Does that report refresh your recollection as to the name of a subject or establishment? Is there a space on that report for such a designation or for such information?

MR. MacBETH: Objection, your Honor.

THE COURT: Yes, sustained. The report is not in evidence, Mr. Goldberg.

Q Would that report, from looking at that report, do you see anywhere the name Donald Payden?

MR. MacBETH: Objection, your Honor.

THE COURT: Sustained. The report is not in evidence.

Q Was the name Donald Payden mentioned to you or written by you on any report, any of these reports?

MR. MacBETH: Objection, your Honor.

THE COURT: Yes, sustained.

Q Who types out these reports?

A The secretary.

Q Does she type out the complete report or just the bottom half?

A The bottom half.

Q Who types out the upper portion?

A I believe that is done by the agents or under their supervision. I'm not sure how it's done.

Q But it is done before you receive your--before you fill out your portion of the report?

A Yes.

Q Looking at these reports do you see the name Country in there?

MR. MacBETH: Objection, your Honor.

THE COURT: Yes, sustained, Mr. Goldberg.

The jury will not infer anything at all by reason of the statements of Mr. Goldberg or the questions to which I have sustained objection.

Proceed, Mr. Goldberg.

Q Aside from doing the chemical analysis of the compounds did you physically observe these compounds?

A Just by appearance when I open the evidence and I look at it and I examime it before analysis.

Q I show you Exhibit 1 and I ask you to take a look at it, at least insofar as you can through the plastic bag, and indicate whether from your observation at this time that substance appears to be rocky or granular.

MR. MacBETH: Objection, your Honor.

THE COURT: Yes, sustained.

Q Do you recall whether or not on August 6, 1974 when you did your analysis, did you then reach an opinion as to whether or not that substance was granular or rocky?

MR. MacBETH: Objection.

THE COURT: Did you make any observation at that time?

THE WITNESS: It might be on my work sheet if I looked at it.

THE COURT: Then look at your work sheet.

THE WITNESS: Exhibit 1.

(Pause.)

THE COURT: You have no present recollection; is that correct?

THE WITNESS: No.

THE COURT: See whether or not that refreshes your recollection. You can't tell us what's on the report; you can tell us whether or not it refreshes your recollection.

THE WITNESS: No, I don't have any indication.

B2 THE COURT: One way or the other?

THE WITNESS: Yes. All I could say is--

THE COURT: You have no recollection?

THE WITNESS: No.

THE COURT: Next question.

Q May I see that report?

A Sure.

If I can explain something--

THE COURT: No, just answer questions that are put to you.

MR. GOLDBERG: Your Honor, I would like to mark this for identification.

MR. MacBETH: That has already been marked, your Honor. Every sheet has been marked.

Q In your examination of the compounds in this case you observed the containers themselves; is that correct?

A I opened the evidence and I examined it thoroughly.

Q I assume in order to examine it thoroughly you had to examine the containers which contained the substance?

A Yes.

Q Can you describe the containers in each instance?

THE COURT: Do it one by one.

Exhibit 1.

A Yes, they were tinfoil packets for Exhibit 1.

THE COURT: Exhibit 2.

THE WITNESS: If I can look at DEA 7.

THE COURT: Yes, you can refresh your recollection.

Q This might help you (handing).

A Exhibit 2 is a plastic bag.

Q Did you record the size of the plastic bag?

A No, I usually refer to it as small or large.

Q In looking through that zip top bag, can you make any determination as to the size of the plastic bag, Exhibit 2?

A I would call it a medium size plastic bag.

Q And Exhibit 3?

A It is a cellophane bag.

Q Different from the plastic bag?

A Yes. Cellophane is usually a little stiffer, in my opinion.

Q Is there a test or testing procedure whereby drugs may be compared with each other, in other words, different substances may be compared with each other in order to determine whether or not they are from the same origin?

A That has been tried before. It's very difficult to show that drugs come from a common origin.

Q But there is such a process, is there not?

A I believe there are such processes but I'm not familiar with them.

Q Do you know whether or not anyone in your laboratory is capable of performing such an examination?

MR. MacBETH: Objection, your Honor.

THE COURT: Yes, sustained.

Q Do you know in this instance whether or not anyone besides yourself may have or might have compared the drugs on these three instances and compared whether or not they came from or emanated from the same origin?

MR. MacBETH: Objection.

THE COURT: Sustained as to form. Did anyone else in your departmnet--

THE WITNESS: Analyze?

Q Yes.

A No, I was the only one who handled the evidence.

Q Did anyone else in your department request such an examination?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Were you asked to perform such an examination?

MR. MacBETH: Objection.

THE COURT: Overruled.

A I was just given the evidence once to analyze and that is it.

Q Who gives you the evidence?

A It is assigned to me by my supervisor and I obtain it from the evidence technician, who gives it to me from the vault.

Q If you know from common practice in your laboratory, do you know where the chemist technician gets it from?

A Well, he has access to the vault, the evidence technician.

Q Do you know how he gets it from the vault?

A Well, it is received from--it is delivered to him and he makes notes of it and logs it in and places it in the vault until it is assigned to individuals.

Q In this case, do you know who submitted these substances for analysis?

MR. MacBETH: Objection.

THE COURT: No, I will permit it.

A In the lab?

Q In the lab. Who requested that they be analyzed?

A It is written on DEA 7.

Q Who was it?

A For Exhibit 1, it was Police Officer Vance Herlihy, and Exhibit 2 and Exhibit 3 by the same individual. And they have the dates.

Q On each occasion where Herlihy made the submission for analysis?

A Yes. And also the reports indicate who accepted it in the lab.

MR. GOLDBERG: No further questions.

THE COURT: Anything further?

MR. MacBETH: Just a few questions, your Honor.

XX REDIRECT EXAMINATION

BY MR. MacBETH:

Q Mr. Godino, is it your responsibility to conduct a chemical analysis of the exhibits which are given to you?

A Yes, it is.

Q Do you take any part in the investigation of cases outside?

A No.

MR. MacBETH: No further questions.

THE COURT: All right. You may step down.

(Witness excused.)

THE COURT: All right, members of the jury, we will take a short 10 minute recess.

Don't discuss the case.

(The jury left the courtroom.)

THE COURT: I have a bench book here which indicates that a grain is 15 times as much as a gram.

MR. GOLDBERG: Officer Jackson said that a certain number of grams are within a grain.

THE COURT: That is what my book indicates.

MR. MacBETH: That would be correct.

THE COURT: Yes, it would be correct, according to the bench book which I have which would not be authoritative.

MR. GOLDBERG: There are grains within grams, not grams within grains.

THE COURT: Not according to the book I have. It takes 15 grams to make a grain.

MR. GOLDBERG: I think that is backward, your Honor.

THE COURT: Not according to the book I have, which you are welcome to look at.

(Recess.)

1 rkmch

(In open court; jury not present)

MR. MACBETH: At this time the Government rests, your Honor.

THE COURT: Very well.

MR. MEYERS: May we proceed on the motions?

THE COURT: Yes.

MR. MEYERS: Your Honor, on behalf of the defendant Vernon, first I move that all the testimony pertaining to the "confidential informant" be stricken from the record on the ground that the Government failed to establish that there was a confidential informant. There was no background preceding the testimony of Mr. Jackson as to whether or not this confidential informant was a registered informant, whether on any prior occasions he had ever worked as an informer for the Government.

On the contrary, we have a situation where we didn't have a confidential informant but a participant in a series of transactions.

Therefore, I respectfully submit, first, that all the testimony of the Government's witnesses pertaining to what they referred to as a confidential informant should be stricken from the record.

My second motion is that the indictment should be dismissed on the ground that there is a considerable variance

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between the indictment and the proof. The indictment is predicated on a proposition of a conspiracy to distribute, possess and distribute. I think the Government has gone far afield and instead of dealing with possession with intent to distribute has gone into specifically sales. That is a very definite distinction, between a sale and possession to distribute.

It is true, since 1970, the term "distribute" means to deliber. Had the Government simply confined itself to the fact that John Jones is supposed to have possessed with intent to distribute, they could very possibly have made out a prima facie case, of course barring any other evidence, but they didn't. They went into specific transactions pertaining to sales and I emphasize that because if the Government proceeded on a basis of specific sales, then I maintain that I was entitled to show that my particular defendant was a procuring agent for a sale; in other words, that the defense of procuring agency still applies despite the amendment in 1970 to a transaction which is a sale.

On the question, was there a conspiracy, what elements have been produced by the Government to sustain, if they can, Count 1? What do we mean by a conspiracy? Was there a partnership? Was there an agreement? Is there

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any circumstantial evidence that would lead one to an inference that there was a conspiracy?

It's true, the Government is not required to point out specific situations, but if it attempts to draw a conclusion from circumstantial evidence, what were the circumstances upon which the Government predicates a conspiracy?

What we have here is a series of transactions in which the defendant Vernon concededly is alleged to have introduced a particular individual for the purpose of that individual making a sale. Even in this particular case, on the testimony of Officer Jackson, he admitted that these cases in which Mr. Vernon is alleged to have taken part were merely introductions; that on two occasions, on the August 27th transaction, he had given him $50 and he said, in appreciation of the introduction.

On the October 3rd transaction, he gave him $100 in appreciation of the introduction.

A conspiracy with a defendant by the name of Payden? The evidence from Mr. Jackson indicates on the August 27th transaction and the October 3rd transaction Mr. Vernon is supposed to have said, "I will take you to a Cuban," who undoubtedly not Mr. Payden, "I will take you to the Oasis Restaurant or bar. I may have another source for you at the Gallery Bar." And on the October 3rd

transaction, even the Government concedes that the October 3rd transaction was not a part of any conspiracy, when they made their motion to sever and they made it in the memorandum.

Certainly, as far as Count No. 1, there is not a scintilla of evidence that a conspiracy or an agreement existed between Mr. Vernon and Mr. Payden, the defendant in this particular case.

My fourth motion is to dismiss the indictment on the ground that if there was a conspiracy, if there was a conspiracy that existed between two individuals, between Mr. Payden, allegedly, and Mr. Vernon, and the conspiracy can only be carried out, to possess and distribute between the two individuals and no other individuals, and therefore there could not be a conspiracy to possess and distribute a controlled drug.

Insofar as the substantive counts are concerned, Substantive Count No. 2, there we have again that if the Government had restricted its testimony to a mere possession with intent to distribute, that would have been sufficient, but here again they predicate a sale, the amount that was gotten for the transaction, the circumstances under which, and so on.

Count No. 3, the October 3rd transaction: Here

5 rkmch

we have an entirely different situation. Here we have neither possession, constructive or otherwise.

What were the facts as testified to by Mr. Jackson? He said, "I asked Mr. Vernon did he know anybody who could sell -- I wanted some Cuban cocaine," I think, at that particular time, and as I understand the testimony, Mr. Vernon is supposed to have gone to another individual, David Bell, and there had said to Bell, "Look, I have somebody who may want to buy cocaine," and the arrangement was that about an hour, hour and a half later, David Bell was to come back to Mr. Vernon's apartment, and he did come back, and what was the scene that confronted Mr. Bell when he entered the apartment? Mr. Vernon was sitting at the table, the confidential -- the undercover agent was sitting at the table, and a woman, I believe, was there, and Mr. Bell enters, places the cocaine on the table.

Then, from that point on, it's examined by the undercover agent. He tests it. The only thing he asked Mr. Vernon to do, Mr. Bell having deposited the cocaine on the table, now the undercover agent wanted to put it back into its plastic container, and Mr. Vernon is supposed to have given a playing card so they could scoop the thing up and put it back.

The agent now has possession and control of that

particular drug. Bell leaves and the agent then turns over to Mr. Vernon the $100 which he testified was in appreciation for the introduction to Mr. Bell.

Vernon and the undercover agent then leave, and apparently the undercover agent had discovered that the weight that had been given to him by Mr. Bell was short. The next day the undercover agent goes back with Mr. Vernon to Mr. Bell's brother and says, "Look, your brother Dave gave me a short weight."

He said, "I will see what I can do about it," and that is that.

No money was turned over on that transaction to Mr. Vernon. The undercover agent turned the money directly over to Mr. Bell.

So I say, the mere physical position of Mr. Vernon in that particular room in no way constitutes constructive possession or possession of any kind --

THE COURT: Unless it's aiding and abetting. That is the basis upon which the Government proceeds.

MR. MEYERS: I am sorry, I can't hear you.

THE COURT: The Government proceeds on the theory of aiding and abetting in connection with the substantive counts, Substantive Count 6, anyway.

MR. MEYERS: I am talking about Count 6.

THE COURT: They go under the theory of aiding and abetting.

MR. MEYERS: I am referring to Count 7.

THE COURT: The Government goes under the theory of aiding and abetting.

MR. MEYERS: The Government maintains my client was involved in the possession with intent to distribute.

THE COURT: Or aiding or abetting the principal in the transaction.

MR. MEYERS: As a principal.

THE COURT: No.

MR. MEYERS: 841(a)(1) and 841(a)(2) under Count 6.

MR. MACBETH: There is no necessity to allege Section (2).

THE COURT: I am aware of that.

That is the theory they go on.

I believe there is a question of fact that should be submitted to the jury as to the conspiracy in the substantive count, and motions to strike and dismiss are denied with exceptions.

MR. GOLDBERG: May I be heard?

THE COURT: Yes.

MR. GOLDBERG: I have a motion at this time, and I

would also like to indicate to the Court that papers in support of our motion at this point for a directed verdict of acquittal are being prepared and will be submitted to the Court.

Nevertheless, I wish at this time to move for that same relief without the papers, based upon the fact that nowhere in the course of what has transpired over the last couple of days, or the Government's case in chief, has there been any evidence to warrant a finding insofar as against my client, Donald Payden, a prima facie case.

My best understanding of the conspiracy statute and the rules that allow for the admission of certain evidence indicate that the admission of extrajudicial declarations made by a co-conspirator in the furtherance of the conspiracy can prove that conspiracy, but a threshold question prior to as to whether or not, independent of those declarations, the conspiracy can be proved by independent evidence, namely, evidence that does not incorporate the extrajudicial statements of the co-conspirator.

Now, I have read through the transcript of those proceedings that took place on November 13, 1975 or, for our purposes, the testimony of Officer Jackson in his direct examination. He has indicated and mentioned the name Country or Donald Payden so far as an assertion that

certain out-of-court or extrajudicial declarations were made, at least on Page 19 of that testimony, where Mr. Vernon is alleged to have said, "We just passed Country," that Country had the best cocaine around, and "I would be interested in buying some of Country's cocaine," et cetera. That is what he says on that page.

On Page 20, Jackson again states that he observed a person called Country who engaged Billy Vernon in a conversation, and that later Billy Vernon came back. Jackson said, "I asked him how was the cocaine and he said it was still Country's man and the cocaine was of good quality."

Nowhere in these two portions of the evidence is there any quotation or indication through Billy Vernon that Donald Payden had said anything with regard to the conspiracy count and with regard to performing, executing or intending to be within the framework or act in violation of the law.

The only other portions of the transcript that refer to Donald Payden on direct examination of Officer Jackson is when Mr. Vernon states to Officer Jackson that if Jackson doesn't like the cocaine, he could return it, and these eseentially, your Honor, they are not really statements, but they are in effect conclusions declared here

or testifiedhere by Officer Jackson as to what he believed that Billy Vernon told him, which one step further were mere conclusions, I he was nowhere actually stating what in fact Donald Payden had said to Billy Vernon at any time.

In that they are conclusions, your Honor, and no independent conspiracy has been proven, I don't think from what we have heard here, with the standard of proof as applied in the Second Circuit, namely, to my understanding, either the substantial evidence measurement or the fair preponderance of the evidence measurement, there has not been any evidence to establish any conspiray with regard to Donald Payden.

I also make this same motion, namely, for a directed verdict of acquittal for Counts 2 and 3 of the indictment and this most certainly on the ground there is no evidence to establish the substantive crime that Mr. Payden is being accused of; namely, to distribute narcoticd in violation of the federal narcotics laws.

I think it's at this posture, your Honor, having read through a number of decisions in Judge Weinfeld's treatise on this area, I believe it's up to the trial judge before this matter is submitted to the jury to make this preliminary determination, and make it fairly, and make it consistent with the evidence that you have heard.

All too often, jurors hear this hearsay, these extrajudicial declarations made to them, usually on the basis of connecting these statements when and if independent evidence is proffered indicating the existence of the conspiracy, but now after all the Government's proof, after all their evidence is in, there is no evidence establishing independent of these declarations the existence of this conspiracy. And for these reasons, your Honor, I not only move for a directed verdict of acquittal, but I move for a dismissal of the indictment.

I make a motion to strike all this testimony, all this conclusory or hearsay testimony, on the ground that the Government has not met their burden of establishing that independent evidence.

Moreover, your Honor, I move at this time for a limiting instruction,if your Honor denies my motion, to this jury so far as directing them and giving them the guideline through which they which they are to have heard and what they are to do with these declarations, so far as establishing or finding a case against Mr. Payden, but let me reiterate, your Honor, I feel, based upon what objectively can be seen from this record, that the Government at this time, and I believe it's the proper time, has not met their burden, has not established a prima facie case, and

has not met the two-pronged requirement of establishing independent of any statements the existence of this conspiracy.

For these reasons, I move for a directed verdict of acquittal on Counts 1, 2 and 3 as against defendant Donald Payden.

THE COURT: I deny the motion. I believe there is sufficient proof outside of the statements of Mr. Vernon. There is quite an abundance of circumstantial evidence outside of that, sufficient to create a question of fact for the jury.

MR. GOLDBERG: My understanding of circumstantial evidence is that it can't be just equivocal.

THE COURT: I don't think it's equivocal. I think there is sufficient proof aliunde the allegations to find that Mr. Payden may have been a member of the conspiracy.

With respect to your other application about limiting instructions, you will recall that we had the witness on the stand for a considerable amount of time. No objections were made and I let it go in without any limiting instructions on my part.

I had intended in my charge to the jury to emphasize more than I usually do the statements of the conspirator, that first they must find out a conspiracy

existed and from that they may find there were other members of the conspiracy, and under those circumstances they may use the statements against all persons found to be members of the conspiracy.

I have reviewed the record here, and you moved to strike that testimony, which I denied. Usually we take that subject to connection, and I so inform the jury at that time. I didn't do it at the time it was up because there was no objection made. I was not aware of what counsel had or what they expected to prove or how you were going to try your case; therefore, I did not on my own make any statement to the jury limiting the manner in which they should receive -- not receive, but in accordance with the testimony given -- if you wish me to make it now, I can give them a general charge that any statements attributed to anybody are not to be considered against anybody else except under the circumstances by which a conspiracy must be found.

I will do that now, if you wish. I intended to do it certainly in my charge and to emphasize it particularly there, in view of the fact no preliminary instructions were requested to be given.

MR. GOLDBERG: I would ask your Honor to make that limiting instruction, and my requests to charge should be

finished. They are working all morning on them, and I have, in my own requests to charge, directed one of those charges to bear on this issue, and I would ask your Honor to consider that issue.

THE COURT: Actually, that is part of my standard charge on conspiracy, and you are welcome to look at my standard charge.

MR. GOLDBERG: One of the reasons why I raised no objection at that time, I am aware of the practice here in the Southern District which, in effect, takes this extrajudicial statement out-of-court declarations always subject to connection, and when that connection is made -- I believe whether or not that connection is made, the motion is usually made at the end of the Government's case.

I feel that the Second Circuit is wrong, and I object to the manner in which this court allows that sort of testimony in.

THE COURT: Some counsel do it a different way. I didn't know how you were doing it since it was the first time you appeared before me.

MR. GOLDBERG: It is my belief that this type of testimony doesn't amount to just harmless error. From my reading of the federal rules, it would amount to, if introduced without any basis, plain error, which would not

require any objection, but the Court could, in and of itself, strike from the record, and the Court could sua sponte make its own limiting instruction to the jury.

THE COURT: All right.

Do you have your first witness?

MR. GOLDBERG: I think Mr. Meyers will go first.

THE COURT: Mr. Meyers?

(Continued on next page)

MR. MEYERS: Your Honor, in relation to the defendant Vernon, I think we emphasized throughout that we were anxious, not only anxious, but it was essential that the gentleman who went along with the agents, who was--

THE COURT: Mr. Law, I understand, has been subpoenaed.

MR. MEYERS: Yes. We served him.

THE COURT: Is he here?

MR. MEYERS: That is the difficulty. He isn't here. At least, we haven't seen him. In fact, Mr. Goldberg served him.

MR. GOLDBERG: Your Honor, I state for the record, this is why I said it was going to make matters even more confusing, but it was his witness and I served him. This past Saturday I worked, and I went up to premises 125 West 116th Street about 10:00; knocked on apartment 1, was met by a woman who--

THE COURT: You served him with a subpoena for him to be here.

MR. GOLDBERG: That is correct.

THE COURT: Is there any way the Government can contact him to see why he is not here?

MR. MacBETH: Our office has not been in touch

with him, your Honor.

MR. MEYERS: He is under control of the probation department.

THE COURT: Which is a separate department. I am asking the U.S. Attorney to--

MR. MEYERS: They have control over him.

THE COURT: Please. I am asking the U.S. Attorney if he can make any arrangements.

MR. MacBETH: I will do what I can, but I very much doubt that there is anything our office can do. We really did not know where he was. The defendants did. I will check again and see whether anyone does.

THE COURT: All right. He certainly ought to obey a subpoena.

Do you have another witness to put on now?

MR. GOLDBERG: I have a witness.

THE COURT: Mr. Meyers, do you have a witness?

MR. MEYERS: I did ask that the U.S. Attorney who handled the--Mr. Timbers--who handled the law prosecution in this particular Court be produced to demonstrate what considerations, if any, the circumstances under which Mr. Law was employed, what promises were made, and what the result of those promises were; to demonstrate, one, the motivating factor of any testimony of Mr. Law, and also

to raise the question--I know it's been determined in more serious cases, perhaps, but I would like to preserve the record--as to whether or not the Government's connection in this case, on broadly whether or not the Government can in the event that a defendant or a man has been arrested and charged with very serious drug violations--

THE COURT: This is not the time to raise that. We may not have a conviction here, in which case you have nothing to raise. So that this is not the time to raise that. I will not permit you to put before the jury what Mr. Timbers may have found.

MR. MEYERS: On the question of entrapment, your Honor, but if the testimony of Mr. Jackson is believed as to whether or not he had a conversation or conference with Mr. Vernon during which time Mr. Vernon seemed to be the agressor in the transaction, but if it could be demonstrated through the so-called confidential agent that it was at the confidential agent's insistence--

THE COURT: We are going to try to get him here to testify. But don't think you can handle that through the prosecution of the U.S. Attorney who prosecuted Mr. Law.

MR. MEYERS: Through the agressive approach of Mr. Law, I can demonstrate factually that Mr. Law was

given a suspended sentence on two very serious drug counts--

THE COURT: Bring the judge in who sentenced him, too.

MR. MEYERS: I think it is quite important.

THE COURT: I don't think it is at all. The judge has the final say as to sentencing and there is no doubt about that.

MR. MEYERS: Then if your Honor says this is not the time to argue, will the U.S. Attorney concede--

THE COURT: This is not the time to argue about whether or not the conduct of the Government was so reprehensible that the indictment should be dismissed. This is not the time to do that.

MR. MEYERS: Will the Government concede that as a result of a Mr. Law who acted as the confidential agent in this case was ultimately indicted and given a suspended sentence on the two counts in which he was involved, and that they held off indicting this particular defendant for about seven months, during which time he was instructed to go out and get people who might supply sources of drugs?

I think the question of the consciencable action on the part of the Government under those set of circumstances, whether or not Mr. Vernon had been deprived of

due process.

MR. GOLDBERG: May I be heard, your Honor?

THE COURT: I want to hear the Government first.

MR. MacBETH: Your Honor, I won't concede that at this time. I doubt very much whether it reflects facts in any case, and I'd have to have an extended discussion with Mr. Timbers on anything beyond the question of the indictments themselves.

MR. GOLDBERG: I went out and served Mr. Law, the reason being that, A, he as a witness insofar as my case is concerned. He was present during a portion of alleged transaction and certain statements he made on the day before this August 6th or August 5, 1974, I feel are important insofar as my client is concerned. Namely, statements he made to Officer Herlihy, which appears on the DEA 7, so far as what Mr. Vernon could do and what he said Mr. Vernon could do was not what Mr. Vernon could do, as indicated by the evidence in chief.

I will state to the Court that when I went to 125 West 116th Street, I spoke with Mr. Law's mother, who resides in apartment 1. I spoke with Mr. Law's sister, who resides on either the second or third floor, where I eventually served her. But they indicated to me that they were told that there was no way in the world that this

man was going to come to Court and that he's been promised that by the Government. I don't know which Government. He didn't say State or Federal. But they indicated to me that part of their deal was that he didn't have to testify. And when they got that subpoena that was the reaction he received from these people, and I might add I was very much surprised by their action.

MR. MacBETH: That is a charge on which I know absolutely nothing. I have no information at all to indicate that any such statement was made by any Government agent.

MR. GOLDBERG: I am not accusing the Government of saying it. I am only saying this is the premise the man is going on.

THE COURT: Maybe at the luncheon recess you can see what you can do about getting him in here, if you can.

MR. MacBETH: Yes, your Honor.

THE COURT: Do you have a witness to put on now? Who is going to go first?

MR. GOLDBERG: Mr. Meyers is going to go first and that was his first witness.

MR. MEYERS: What is our status in relation to Mr. Law?

THE COURT: He is not here.

MR. MEYERS: Yes, but that shouldn't end the question.

THE COURT: During the recess the Government is going to make some attempt to get him here.

MR. MEYERS: I think there should be some effort made by the Government to attempt to bring him down.

THE COURT: I said they are going to do that during the lunch recess. Do you have another witness to put on the stand? They represent to me that they have no control over him.

MR. MEYERS: If the man is on probation, doesn't that constitute custody?

THE COURT: No, it does not. It has nothing to do with this, the fact that he is on probation. That merely means he is required to do certain things pursuant to the probation department.

MR. MEYERS: Yes, but he's been given a suspended sentence.

THE COURT: I don't care what sentence he's been given. The judge gave him that sentence.

MR. MEYERS: That sentence can be revoked, therefore, I believe he is still under the jurisdiction of the United States Attorney.

THE COURT: No, he is not. Not for the purpose

of that. I asked him to see if they can locate him during the lunch time.

Do you have another witness? That is my question.

MR. MEYERS: No, I have no other witnesses. We have--

THE COURT: Please. We have been here for 35 minutes. I asked you if you had a witness to put on now.

MR. MEYERS: The question you asked me is difficult because in the event Mr. Law testifies I may or may not determine whether or not to put Mr. Vernon on the stand.

THE COURT: Donald Payden is the first named defendat. Do you have any witnesses to call, Mr. Goldberg?

MR. GOLDBERG: Yes, your Honor.

THE COURT: Put your witness on the stand.

MR. GOLDBERG: Mr. MacBeth indicated to me--

THE COURT: All right. Who do you have here?

MR. MacBETH: I have Officer Herlihy and the two officers from New Jersey--

MR. GOLDBERG: I would like to call the two officers from New Jersey.

THE COURT: Which one do you want first?

MR. GOLDBERG: Magno.

(The jury entered the courtroom.)

EDWARD MAGNO, called as a witness on behalf of the defendant Payden, having been first duly sworn, testified as follows:

THE COURT: Members of the jury, during this recess that was more than 10 minutes the Government rested its case, it concluded the evidence that it is presenting on its direct case.

We are now proceeding with the defendant Payden's case.

There is a particular instruction that I want to give to you at this time. During the course of the testimony of Mr. Jackson, and perhaps in the course of some of the other testimony that came in, there were certain statements that were attributed to the defendant Vernon with respect to certain matters.

I want to suggest to you and I instruct you that such statements in the first instance were taken and should be considered by you solely against the defendant Vernon, and they were taken, those statements were taken on a conditional basis as to the defendant Payden in the following respects:

The first charge of this indictment, as you may remember when I was selecting you as a jury, is a conspiracy, is a charge of conspiracy to possess and possess with intent

to distribute narcotic drugs. A conspiracy, and I will give the full law on that, consists of two or more persons in combination to violate the law.

In a conspiracy, if one is found by you to exist, all members found by you to be members of the conspiracy are bound by the acts and statements made by other members found by you to be members of the conspiracy, as though they were made by every member of the conspiracy.

But to prove the conspiracy any statement made by a person, defendant, is binding only upon that person and is taken, as I have said, on a conditional basis subject to connection, subject to connection that you find those elements that I suggested:

A conspiracy existed, that other persons were members of the conspiracy, and that these statements made were made in furtherance of the aims and objects of the conspiracy.

Is that satisfactory, gentlemen?

MR. MEYERS: Your Honor, may we approach the bench on this matter so that it might be fresh in your mind? May I bring something to your attention?

THE COURT: Is this instruction satisfactory to all counsel?

MR. GOLDBERG: Not in totality. Not the whole

instruction.

THE COURT: All right. Step over here.

(At the side bar.)

MR. MEYERS: Your Honor, I believe you stated that the statements attributed to Mr. Vernon by Mr. Jackson are to be considered solely against Mr. Vernon. But I wonder whether you might qualify it on the basis that if the jury finds that such statements were made

THE COURT: Yes.

MR. GOLDBERG: I don't think it was clear, your Honor, that the statements themselves should not be taken into consideration to the jury so far as establishing the conspiracy itself.

In other words, they have got to judge themselves.

THE COURT: That is a matter the judge must pass upon in the first instance.

MR. GOLDBERG: I think theirs is the ultimate judgment, your Honor.

THE COURT: That will be given in the final instruction. What else?

MR. GOLDBERG: Only when and if independent acts establish a conspiracy can you introduce those.

THE COURT: All right.

(End of side bar.)

THE COURT: There are only two additional comments that I should have covered. One is that Mr. Jackson testified about certain statements made by the defendant Vernon. You would have to first of all find, naturally, that you believe that such statements were in fact made. If you find they were not made, of course, they have no effect.

Secondly, that in order to find the existence of a conspiracy you must find that acts outside of the statements themselves establish the existence of the conspiracy.

With those modifications, gentlemen, is there anything additional?

MR. MEYERS: That is satisfactory.

MR. GOLDBERG: Satisfactory, your Honor.

DIRECT EXAMINATION

BY MR. GOLDBERG:

Q Mr. Magno, do you work for the Federal Government?

A Yes, I do.

Q What is your present assignment?

A I'm a special agent with the Drug Enforcement Administration.

Q Were you so assigned on October 21, 1975?

A Yes, I was.

Q On that date did you have occasion to see this gentleman seated here?

A Yes--

MR. MacBETH: Objection, your Honor.

THE COURT: What is the date?

MR. MacBETH: October 21, 1975.

THE COURT: No, I will permit it.

Q On October 21, 1975 did you have occasion to arrest Mr. Payden?

A Yes, sir.

Q When you arrested him did you find any weapons on him?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Did you find any narcotics on him?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Where did you arrest Mr. Payden?

A I'm sorry?

Q Where did you arrest Mr. Payden?

A At Beech Avenue in the Bronx.

Q Was that in his home or the vicinity of his home?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q What address on Beech Avenue?

A I believe it was in front of 649 Beech Avenue.

Q Were you directed by someone to proceed to that address?

MR. MacBETH: Objection.

THE COURT: Yes, sustained.

Q As a result of the communication you received prior to your going to the Bronx that day, did you proceed to that address?

MR. MacBETH: Object.

THE COURT: Yes, sustained.

Q What time was it that you arrested Mr. Payden that day?

A It was approximately 4:30.

Q Did he resist you in any way?

MR. MacBETH: Objection, your Honor.

THE COURT: Sustained.

MR. GOLDBERG: No further questions.

THE COURT: Anything?

MR. MacBETH: No cross examination.

THE COURT: You may step down.

(Witness excused.)

THE COURT: It is quarter to one. We will go

ahead with our luncheon recess. Return here at 2:00.

Don't discuss the case. Don't make up your mind about it.

(The jury left the courtroom.)

THE COURT: Any offer of proof with respect to your putting this last witness on?

MR. GOLDBERG: Your Honor, I just wanted to establish--

THE COURT: What, that he was arrested and didn't have a gun and drugs on him?

MR.GOLDBERG: That's right, your Honor.

THE COURT: That is absolutely incredible, Mr. Goldberg. It has nothing to do with this case. I'm surprised at you. Absolutely incredible to try and do this before this jury.

2:00 promptly, gentlemen.

(Luncheon recess.)

AFTERNOON SESSION

2:00 p.m.

(In open Court - jury present.)

MR. GOLDBERG: Defendants call Vance Herlihy.

XXX V A N C E H E R L I H Y, called as a witness on behalf of the defendants having been previously sworn, testified as follows:

XX DIRECT EXAMINATION

BY MR. GOLDBERG:

Q Officer Herlihy, were you on duty on August 6th and as well as on August 27, 1974?

A Yes, sir, I was.

Q Were you part and parcel of a surveillance team affiliated with group 9?

A Yes, sir, I was.

Q I call your attention specifically to August 27th. Do you recall that date?

A I will try my best.

Q Do you recall being involved in an arrest on that date?

A Yes, sir.

Q Last week you indicated through some direct testimony that as a matter of fact on that day you sealed,

or signed and sealed some contraband, some evidence.

A Yes, sir.

Q At what time did you sign and seal the evidence?

A Immediately on return to the Task Force office.

Q Do you recall what time that was? Are there any records that would indicate to you or refresh your recollection what time it was?

A Yes, sir.

Q Your DEA 7?

A The P7 and the activity sheet for that day will show what time we got back to the Task Force office.

Q Do you have them?

A I don't have them in here with me, no, sir.

MR. GOLDBERG: Do you have it?

MR. MacBETH: It has been supplied to you already, I believe.

MR. GOLDBERG: Not for me, for him to refresh his recollection with.

MR. MacBETH: I would like it reflected I am handing the witness exhibits marked for identification, Government's Exhibit 3504 and 3514.

Q Would that be helpful in refreshing your recollection as to what transpired on that particular date?

A Yes, sir.

Q Before you arrived at headquarters so to speak, were you at another location prior to then, prior to going back to your office?

A Yes, the meet location wherever that would be that particular evening.

Q Prior to going to that meet location, were you at another location or specifically in the vicinity of 116th Street and Lenox Avenue?

A Yes, sir.

Q Can you tell me from looking at your report, if you need it, what time it was that you arrived the last time, at 116th Street and Lenox Avenue on August 27th?

A I arrived there between 8:30 and 9:00 p.m.

Q When you arrived at that location at 8:30 p.m., was the car you had previously seen driven by Agent Jackson in the vicinity of that location?

A Was it in the vicinity?

Q Did you see it?

A We all arrived in the area approximately the same time. Offhand when I first observed it is when it pulled up in front of the location itself.

Q You are talking about sometime--

A After I--

Q After 8:30?

A Yes, sir.

Q Did you observe Officer Jackson enter a bar at that location?

A No, sir.

Q Did you see him at any time after Jimmy Daniels Bar on August 27, 1974?

A Just in front of the bar. I was unable to stop and I continued driving.

Q In other words, you proceeded to that area on 116th Street and drove by it?

A Yes, sir.

Q This would be about 8:30?

A 8:30, a quarter of 9, yes, sir.

Q When you drove by it, did you position yourself somewhere in the immediate area of that location?

A Each time I went up there I tried to position myself. If I was unable to position myself, I would continue further down and sit further back down the block.

Q You had seen prior to 8:30 or a quarter of 9 before you arrived, you had seen Mr. Vernon, is that correct?

A Yes, sir.

Q Did you have occasion to see him at that location at about 8:30 between 8:30 between 8:30 and 9:00?

A Yes, sir.

Q How and under what circumstances did you see him?

A I recognized him by his red golf cap.

Q When you saw him, where was he?

A It was just right in front of Jimmy Daniels Bar.

Q Right in front?

A By the curb.

Q Was he standing in front or was he walking towards it? Do you recall what his movements were in connection with that?

A No, it was just a quick glance to see if he was there and I kept on moving.

Q Did you see him get off a bus at that location?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Did you see how he got to that location?

A No, sir.

Q Did you see him get out of a Mercedes?

MR. MacBETH: Objection.

THE COURT: He said he didn't see how he got there.

Q Did you see in what direction he was coming from prior to his being seen by you on the curb in front of Jimmy Daniels Bar?

A No, sir.

Q How many other officers did you know who were in that location at that time?

A ADywhere from three to six.

Q Would it be fair to state that these officers were positioned in their surveillance automobiles in various portions of that general vicinity?

A Their general vicinity?

Q The vicinity around Lenox Avenue and 116th Street.

Q I would have to say no.

Q When you saw Mr. Vernon, where were you positioned?

A I didn't hear you.

Q When you saw Mr. Vernon, where were you positioned?

A I was proceeding--I was moving at the time. I was proceeding east on 116th Street.

Q That is a two-way street, is that correct?

A It's a two-way street, correct.

Q When you saw him, were you in front of our just passing by Jimmy Daniels Bar?

A Yes, sir. I just glanced to see if he was there.

Q And he was there?

A He was there.

Q When you proceeded east along 116th Street, did you see any cars either before you reached Lenox Avenue in the

eastern direction or when you got to the next cross street, did you see any surveillance cars?

A I must have but I don't recall offhand where they were.

Q Do you know from reading the reports, your own report, whether or not and under what circumstances Mr. Vernon arrived at that location?

MR. MacBETH: Objection.

THE COURT: Sustained. He said he didn't see him get there and saw him first when he was standing near the curb.

Is that correct?

THE WITNESS: That is correct.

THE COURT: That is the first time you saw him, standing there?

THE WITNESS: Yes.

Q Did you see a Mercedes, any Mercedes in that vicinity at that time?

MR. MacBETH: Objection.

THE COURT: I will permit it.

A No, sir.

Q Did you see anyone in that area who you previously had seen that day, besides Mr. Vernon?

A Yes, sir.

Q Who was that?

A The same people who were outside the hotel and outside Jimmy Daniels every day you pass. I don't know them by name, just by face.

Q Did you see anybody in that area whom you had previously seen in front of 356-1/2 West 145th Street, aisde from Billy Vernon and Mr. Jackson?

A No, sir.

Q You, on August 6th, had seen and been with sometime that day a person by the name of John Law, is that correct?

A That is correct.

Q And you had a conversation with him?

A Yes, sir.

Q At any point during the conversation was the name Donald Payden brought up?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Did you see Mr. Law on August 6, 1974 when you were on surveillance in the area of 145th Street and St. Nicholas Avenue?

A At 145th Street? No, sir.

Q You didn't see him?

A No, sir.

Q How long did you spend surveilling that area?

A With permission, I would like to see my reports for that particular day.

You questioned me on August 6th. On August 27th--

Q My last question was directed to August 6th.

A Your prior question?

Q I am asking you how long on that day on August 6th did you maintain surveillance, you yourself, in the area of 145th Street around St. Nicholas and Edgecombe Avenues.

A I was mainly at 116th Street on that particular evening.

(Continued on page 394.)

Q You were mainly on 116th Street?

A Yes, sir.

Q You say mainly. Do you have any recollection of approximately how long it was? Would it be a minute, a second, 15 minutes, that you actually were in the uptown area of 145th Street?

A I do not have the 6 for that day. I have the activity report for that day.

Q I have your 6 for that day--7, I mean. 3503.

A That particular evening I stayed on 116th Street.

Q The entire time?

A The entire time.

Q Did you make any effort whatsoever on that day to follow Officer Jackson's car?

MR. MacBETH: Objection, your Honor.

THE COURT: No, I will permit it.

A On his initial departure, I did, and I was instructed to return to surveill 116th Street.

Q When you say initial departure, what are you talking about, where?

A When he left 116th Street.

Q When he left 116th Street

A I was to remain behind and try to identify anybody who appeared.

Q Can you tell me what happened with your plan to stay behind?

A Nothing of consequence happened while I was there.

Q Were you able to stay behind Jackson's automobile when he left 116th Street and Lenox Avenue?

A I remained on 116th Street.

Q Isn't this your DEA 7 report, referring now to 3503?

MR. MacBETH: Objection, your Honor.

THE COURT: No, I will permit it.

Q Did you sign that report, Officer?

A Yes, sir.

Q And did you read that report before you signed it?

A Yes, sir.

Q Do you see a portion of that report that indicates that you couldn't follow--

THE COURT: Now, wait a minute.

Q Withdrawn.

Did you state on that report--

THE COURT: No--well, this is your signature? Did you ever on any occasion make such a statement?

Q Did you on--I don't know the date of the--

THE COURT: What's the date of the report?

THE WITNESS: August 7th.

Q Did you on August 7th state in the report that you had lost sight of Officer Jackson's vehicle because of the heavy traffic in the area?

A No, sir.

Q Did you state in that report that Officer Jackson's car was lost because of heavy traffic?

MR. MacBETH: Objection, your Honor.

THE COURT: Yes, sustained.

Q Did you indicate in that report, Officer, that Officer Jackson's car--

MR. MacBETH: Objection.

Q Because of heavy traffic was lost--

THE COURT: Sustained. This report is not in evidence.

Q Did you state on August 7th in writing that Officer Jackson's car was lost because of traffic?

MR. MacBETH: Objection.

THE COURT: Yes. It's not necessarily contradictory; that's the basis of your objection, isn't it?

MR. MacBETH: Yes, your Honor.

MR. GOLDBERG: I am laying the foundation for it.

THE COURT: I will permit you to do it if you

can do it properly.

Q Did you lose sight of Officer Jackson's automobile on August 6, 1974?

A Yes, sir.

Q Where did you lose sight of it?

A When it left 116th Street.

Q Tell this Court how it was, how it came to pass that you did lose sight of this automobile, what happened?

A Because I remained on 116th Street.

Q In other words, you didn't attempt to follow that automobile?

A No, sir.

Q Did you attempt to just look at it while it proceeded up Lenox Avenue until it was lost from sight?

A No, sir.

Q Was that the reason and the circumstances under which heavy traffic got in your way?

MR. MacBETH: Objection, your Honor.

THE COURT: No, I will permit it.

A No, sir.

Q Was it because heavy traffic came between your automobile and Officer Jackson's automobile?

A No, sir.

Q Can you tell me what surveillance was "lost at

this time due to heavy traffic in the area" means?

MR. MacBETH: Objection, your Honor.

THE COURT: I will permit it.

A That was lost by Police Officer Crowe.

Q Officer Crowe?

A Yes, sir.

Q In other words, this report that you signed incorporates some observations made by Officer Crowe?

MR. MacBETH: Objection.

THE COURT: Yes, sustained.

Q Do you know what type of gun Officer Jackson was carrying on August 27, 1974?

A No, sir, I don't.

(Continued on page 399.)

/75 b

1 elmch Herlihy-direct

Q On August 27, 1974, did you have in your possession the address of one Donald Payden?

A Yes, sir, I believe I did.

Q Was that an address on Walton Avenue in the Bronx?

MR. MACBETH: Objection, your Honor.

THE COURT: No, I will permit it.

A Yes, sir.

Q Did you on August 27th, or did you observe any other officer of Group 9, proceed to that address at any time?

A As I recall, Idid, yes, sir.

Q You proceeded to that address?

A I don't know if it was that date, but I did.

Q I'm talking about August 27th. You may look at your DEA-7.

(Pause)

Q Yes or no?

A You have to repeat the question.

MR. GOLDBERG: May I have the question read back, please?

(Question read)

A I did follow him to that address.

Q You did?

A Yes, sir.

Q What time was that?

A Offhand, I couldn't say. It was around 5:00, 6:00 o'clock, I believe.

Q 5:00 or 6:00 o'clock --

A In the evening.

Q Was Mr. Payden with anybody?

A A female.

Q Did you follow him to that address or did you go to that address after some observations were made at 356-1/2 West 145th Street that evening?

A I didn't follow him from 145th Street that evening.

Q Did you write the surveillance report for that date?

A August --

Q August 27th.

A Yes, sir.

Q Did you write in the report on August 27th, or, rather, August 28, 1974, that Donald Payden was followed to that address?

THE COURT: I will permit it.

A No, sir, that is not in my report, as far as I see.

MR. GOLDBERG: No further questions.

THE COURT: Any cross-examination?

MR. MACBETH: I just have a couple of questions.

3 elmch Herlihy-cross/redirect

CROSS-EXAMINATION

MR. MACBETH:

Q Officer Herlihy, what time was it that you followed Mr. Payden to his address in the Bronx on August 27th?

A I believe it was around 5:00 o'clock. I know it was supper time.

Q Was that before you joined the surveillance team which conducted surveillance of Mr. Payden that evening?

A Yes, sir.

MR. MACBETH: No further questions, your Honor.

THE COURT: Mr. Meyers?

Mr. Meyers, do you have any questions of this witness?

MR. MEYERS: No questions, your Honor.

MR. GOLDBERG: May I have one moment, your Honor?

(Pause)

REDIRECT EXAMINATION

BY MR. GOLDBERG:

Q Did you fill out a daily activity report for August 27, 1974?

A Yes, sir.

Q Is there any indication on that report that you went to the Bronx at all?

A No, sir.

MR. GOLDBERG: No further questions.

THE COURT: You may step down.

(Witness excused)

THE COURT: Next witness.

MR. GOLDBERG: Officer Jackson.

C H R I S J A C K S O N, called as a witness by defendant Payden, previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GOLDBERG:

Q Officer Jackson, you said last week when you testified that you didn't wear a Kel transmitter or Nagra tape recorder because you felt there might be some danger in walking into social clubs or things like that; is that correct?

MR. MACBETH: Objection, your Honor.

THE COURT: What did you say about it?

THE WITNESS: Yes, I did, your Honor, among other reasons.

Q Let me ask you this:

Did you have a Kel transmitter or Nagra tape recorder in your car that day?

A No, I did not.

Q Were you going to take your car into social clubs?

5 elmch Jackson-direct

A No.

Q Do you think anybody else would pat you down and search your car?

MR. MACBETH: Objection, your Honor.

THE COURT: Sustained.

Q You said the other day that it would also be difficult to take photographs at night, and I asked you whether or not any photographs were taken.

A Not to my knowledge.

Q And your answer was photographs are quite difficult to be taken at night. Was that your answer, as you recall?

A Yes.

Q Do you recall whether or not the DEA has the possession of infrared cameras?

MR. MACBETH: Objection, your Honor.

THE COURT: I will permit it.

A I believe they do.

Q Aren't those cameras equipped with lenses to take photographs at night?

A Yes, they are.

MR. MACBETH: Objection, your Honor.

THE COURT: I will permit it.

Q Incidentally, what type of gun did you have in your possession on August 27th?

A Off-duty .38.

Q .38 caliber pistol?

A Yes.

Q Was that a police special?

A Yes, it is.

Q On August the 27th you say you met Mr. Vernon on 116th Street and Lenox Avenue after you had seen him, I believe you testified about 8:55 p.m. Do you recall testifying --

A I don't remember the exact time I testified to.

Q Would looking at Government's Exhibit 3502 refresh your recollection as to what time you say you saw Mr. Vernon in the vicinity of Jimmy Daniel's bar?

A Approximately 5:50 p.m.

Q The second time.

A Approximately 8:45 p.m.

(Continued on next page)

Q I believe your testimony was to the effect that at that time you said Billy Vernon gave you some drugs.

A Right.

Q And you gave him some money.

A Correct.

Q After that happened, according to your testimony, did you leave that bar?

A Yes, I did.

Q When you left that bar, did you see any members of your group 9?

A Yes, I believe I seen Police Officer Herlihy.

Q Where was Officer Herlihy?

A I believe he was on 116th Street facing west.

Q Where in relation to the bar, across the street?

A The bar is approximately located on the south--

Q The south side of 116th?

A Right and he was on the northeast corner of 116th Street.

Q How far from the car?

A A quarter of a block.

Q Was he at that location when you entered the bar?

A No, I couldn't say for sure.

Q Where did you pull your car? Where did you bring

your car?

A Right in front of the bar.

Q So you parked your 1971 Cadillac--

A The Government's 1971 Cadillac.

Q I am sorry. It was yours that day.

A I was using it that day, yes.

Q You parked the Government's 1971 Cadillac right in front of that bar, is that your testimony?

A That is my testimony.

Q How far from that 1971 Cadillac was Officer Herlihy's automobile?

A Approximately a quarter of a block away.

Q And he was there when you arrived?

A I don't recall that.

Q Did you see any officer there when you arrived?

A There were some there. I believe it was Police Officer Harrington.

Q Where was Harrington?

A In the area. I couldn't tell you the exact location.

Q Were you in the bar when you say you say Mr. Vernon?

A Excuse me?

Q Were you in the bar when you say you saw Mr.

Vernon?

A Yes.

Q Mr. Vernon walked into the bar?

A Walked into the bar.

Q When he walked in, did you have occasion to look outside and see how it was he came to be at that bar?

A No.

Q How long after Mr. Vernon came into the bar did you go out?

A Approximately ten minutes.

Q When you got out there, you say you saw officers?

A I seen one of the vehicles.

Q One of the vehicles?

A Yes.

Q Did you ask any of those officers how Billy Vernon got to that location?

MR. MacBETH: Objection.

THE COURT: Sustained.

Q Looking at all the reports in this case, is there any information how Mr. Vernon got to that location?

MR. MacBETH: Objection.

THE COURT: Sustained.

MR. GOLDBERG: No further questions.

MR. MacBETH: No cross examination, your Honor.

MR. MEYERS: No questions.

THE COURT: You may step down.

(Witness excused.)

MR. GOLDBERG: No further witnesses.

THE COURT: Defendant Payden rests?

MR. GOLDBERG: That is correct.

THE COURT: Mr. Meyers, are you prepared to proceed at this time?

MR. MEYERS: No, your Honor.

THE COURT: Members of the jur-, we will take a short recess.

(Jury leaves room.)

MR. MacBETH: Your Honor, I would like to report on the efforts to find Mr. Law during the lunch hour.

I asked the agents to go back to headquarters and see what they could do to find him. They had a telephone number there which had been the number for him at 125 West 116th Street. They called that number. That number has been disconnected.

They then called the information number and there is no listing for anybody named Law in that immediate vicinity so it was impossible to get ahold of Mr. Law in any way at that time if in fact he is on 116th Street.

THE COURT: Where did you serve the subpoena,

Mr. Goldberg?

MR. GOLDBERG: At that address, 125 West 116th Street.

MR. MEYERS: April 15th.

MR. GOLDBERG: By way of backing, maybe I can help Mr. MacBeth.

MR. MEYERS: May I for the record introduce the subpoena as a defendant exhibit?

THE COURT: Yes. It doesn't have to be done.

MR. MEYERS: This will be introduced on behalf of both defendants.

MR. GOLDBERG: That is correct, your Honor.

Your Honor, the superintendent of the building is Mr. Law's father. Mr. Law's father is named Billy Law. I had a conversation with Mr. Law's mother who indicated the same thing.

Right above the door as you enter the building, there is a sign to see the superintendent. That is how I came to go to that apartment.

He was not in that apartment, I may say. His sister, whose first name I can't recall, lives in the same building in another apartment and that is where I saw Mr. Law and served a subpoena upon him. I believe it was the second floor. I don't think it was any higher than the

second floor.

I saw her. She told me he hasn't been living there.

THE COURT: You personally served him?

MR. GOLDBERG: Yes, I did, your Honor.

THE COURT: What else do you have, Mr. Meyers?

MR. MEYERS: Nothing else. The defendant will not take the stand if I cannot examine Mr. Law.

I would like to examine Mr. Timbers who handled the prior prosecution. Beyond that I have no other witnesses.

THE COURT: Are you going to put the defendant Vernon on the stand?

MR. MEYERS: My client will not take the stand unless there is preliminary testimony I can get in relation to Mr. Law or Mr. Timbers.

MR. GOLDBERG: Your Honor, I closed Mr. Payden's case. One of the reasons being we got this witness. Had we had this witness, I may very well have put Mr. Payden on the stand but I think this witness is important and I want to call him.

THE COURT: You served a subpoena on him and he hasn't responded to it?

MR. GOLDBERG: I think we ought to cite him for

contempt.

THE COURT: If you can find him and bring him here.

MR. GOLDBERG: He is reporting regularly to probation otherwise he wouldn't be at that location. He would be either gone or incarcerated.

THE COURT: I don't what his probation routine is.

MR. GOLDBERG: Your Honor, I was told by his relatives that he was on probation.

THE COURT: He may be on probation but they may have him report once a week, once a month, every two weeks. I don't know what it is.

MR. MEYERS: Your Honor, looking through the record, I notice on the prior occasion he had failed to report to the probation officer and I think they secured a warrant of arrest for his appearance in the probation department, so this apparently is a deliberate evasion of the subpoena.

THE COURT: It's obvious if a subpoena has been served and he has been told to appear and he hasn't appeared, he has violated the subpoena. There is no doubt about that.

My only concern is you had his address, you had

his name at least as early as sometime last week and maybe even before this case started as far as I know. That is so, isn't it?

MR. GOLDBERG: Not to me.

THE COURT: Mr. Meyers, you had his name and address before this case started?

MR. MEYERS: No, I didn't. I just learned about this last Wednesday or Thursday when I happened to search the record over here, I learned of his name fro my client Mr. Vernon and I searched the record on the fifth floor under John Law and found this folder and went through the file.

THE COURT: So you had it either Wednesday or Thursday. We picked the jury in this case on Thursday, did we not?

MR. MacBETH: We did.

THE COURT: You wanted until Saturday to subpoena the witness?

MR. GOLDBERG: Your Honor, if I had any information before that, I would have subpoenaed him but I didn't.

THE COURT: Your co-counsel didn't have any difficulty in getting it.

MR. GOLDBERG: I didn't know the man's name. That makes it difficult.

THE COURT: You could have asked Mr. Meyers. Usually defense counsel at least in matters of common interest consult with one another.

MR. MacBETH: Your Honor, apparently the defendant Vernon knew the man's name for a considerable period of time. It's simply a matter of looking in the record and determinining what the address is.

In any case, the subpoena was served in appropriate time for the witness to be here.

THE COURT: Absolutely.

MR. MacBETH: The Government has no more control of the witness than the defendants do and has made a good faith effort during the course of the lunch hour to locate him. There simply is no phone listed to a Law at that address and the number the agents had previously has been disconnected.

MR. GOLDBERG: Your Honor, perhaps we can use the good offices of the Court and the marshals to bring this man down. I believe we are entitled to have this man's presence before this Court.

I don't think from what I gather that there was just a chance meeting on my part. His family indicated he was there on a regular basis. As a matter of fact they said he didn't sleep there the night before. They said

he was always there on a regular basis and he hangs out on that street, 116th Street among all places, Lenox Avenue and I don't think we should walk away from him.

THE COURT: I just asked Mr. Meyers if he wants to put any other witness on the stand at this time.

MR. MEYERS: I have no other witnesses other than Mr. Timbers.

THE COURT: We have been through that.

MR. MEYERS: Beyond that, I have no other witnesses on behalf of the defendant. I think there are many serious questions of law involved, though.

THE COURT: There may well be but they are not before me. All I am concerned with is the present indictment and the information submitted before me.

MR. GOLDBERG: May I suggest, since he was somewhat successful on Saturday, my going up there and seeing if I could convince him to come down--I believe he is here now--no, it's not him.

THE COURT: Do you have the phone number of his father that is the superintendent at that building?

MR. GOLDBERG: No.

THE COURT: Doesn't he have a phone?

MR. GOLDBERG: I don't know that. I saw the name "Law" and I put two and two together and felt perhaps he

was a relative.

THE COURT: Any way you can ascertain if that phone number is available, Mr. MacBeth?

MR. MacBETH: I can try the agents again, your Honor. I can try the probation department and see what the probation department has on him.

THE COURT: Let's see what you can do now. I don't like to adjourn Court at 3:00.

We will take a recess. You report back here what you have found.

Gentlemen, have you seen a copy of the indictment that Mr. MacBeth has revised here?

MR. MEYERS: Yes.

MR. GOLDBERG: Yes.

THE COURT: Is that satisfactory to you?

MR. MEYERS: Yes. I take it there will be no overt acts referred to beyond those set forth in this indictment?

MR. MacBETH: That is correct. It will be the first 7.

THE COURT: 13 and 14 are now out?

MR. MacBETH: They should be out because it's a different conspiracy than the conspiracy charged here.

THE COURT: Then this is satisfactory to both

of you?

MR. GOLDBERG: May I look at it, your Honor?

THE COURT: Yes.

MR. MEYERS: Your Honor, I was speaking to a gentleman here who said he just left him about a half hour ago on 116th Street.

Your name is?

A VOICE: Sales.

MR. MEYERS: Did you see him today?

MR. SALES: I didn't see him today. I talked to him Saturday.

MR. MEYERS: Did you see him today?

MR. SALES: No. His sister said he didn't come home last night.

MR. MEYERS: But he told you he was served with a subpoena?

MR. SALES: Yes.

MR. MEYERS. What did he say he would do in relation to the subpoena?

MR. SALES: He said he wasn't coming to Court.

XXX (Defendants' Exhibit C marked for identification.)

(Recess.)

(In open court; jury not present)

MR. MACBETH: Your Honor, I got in touch with the probation department and they had the following facts to report:

Mr. Law failed to report to the probation office on July 2nd of this year and has failed to report since then. A bench warrant was issued for him for violation of probation on the 15th of October of this year, and they have not been able to locate him. They gave as his last address 125 West 116th Street, the address that we had previously, and as his phone number, 666-1237. I have attempted to call that number a number of times. I consistently get a busy signal, and just before your Honor came in was attempting to verify whether that was the disconnected number. It gave an abnormally busy signal, and I think it might be the disconnected number that the agents had earlier.

I would think that in this situation perhaps the best course would be to issue another bench warrant for Mr. Law and see if it is possible to locate him between now and tomorrow.

THE COURT: I think that is what we will do.

On the issuance of the bench warrant he is to be brought here by 9:30 tomorrow morning, if found by then.

(Jury present)

THE COURT. Sorry to keep you waiting outside, but a witness who was expected to have been here has not arrived, and we are going to find that witness' location. We can't tell what time he will be here, and there is no sense in keeping you here in the event that something might happen, so we are going to adjourn early today.

I wish I could have done it earlier, but I had to satisfy myself that there was no possibility the witness would be here this afternoon.

Don't discuss the case with anyone, have a pleasant evening and be back here at 9:30 tomorrow morning.

(The jury left the courtroom.)

THE COURT: We will see what that produces. Since the witness isn't here, I am going to expect you to proceed anyway. I am giving you enough time to get him here. We issued a bench warrant, so if he can be found he will be here. If not, it is one of those things.

In connection with your requests to charge, Mr. Goldman, on No. 1, I am not going to charge the first two sentences of that request. I will charge the balance of it.

As to Request No. A-2, granted. However, I will charge in my own language.

Item B, I will charge substantially as you have it there, but in my own language.

C, Subdivision 1, I will charge that. I will charge the first part of No. 2, but not the second sentence thereof. I will charge C-3 and No. 4 I will charge in my own language. C-5, I grant your request. C-6, I will charge in my own language. I will charge C-7. I will deny No. 8, except that I will charge the appropriate portion in my own language. No. 9 will be in my own language substantially as requested. No. 11 I deny. 12 I deny.

D-1 is granted.

E-1, 2 are granted.

F-1 granted; 2 granted; 3 granted; 4 granted.

G, as to the weight of the testimony, I will charge in my own language. G-2 is granted. G-3 is denied. G-4 is denied. G-5 is granted. G-6 is denied, except as I will charge in my own language.

H-1 is denied. H-2 and 3 are denied.

As to I, overt acts, as to No. 1, I will charge that in my own language , the principle involved. I-2 is denied.

J-1 is granted.

I-1 is granted. K-2 I will charge in my own

language.

L-1 and 2 are granted.

All right, gentlemen, 9:30 tomorrow.

MR. MEYERS: In relation to the Government's Request No. 8, the particular overt acts, I notice that the Government wants you to read the overt acts. You remember there was quite a discussion about an overt act alleged to have taken place on October 23, 1974.

Is it your Honor's intention to indicate to the jury that they are to pay no consideration whatsoever to any evidence covering the transaction of October 23, 1974, particularly since the redrafted indictment makes no reference to that and restricts itself as the last overt act having occurred on August 27, 1974?

MR. MACBETH: Your Honor, the request is to read the overt acts 1 through 7 in the indictment. Obviously the use of those overt acts in the indictment in no way bars the Government from proving any other overt acts in furtherance of the conspiracy, and the October 23rd act is in furtherance of the conspiracy.

THE COURT: I will read the indictment as it is here. The overt act of October 23rd is part of the case and I will not change anything with respect to it.

MR. MEYERS: I am more concerned about the

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detrimental part of the case with respect to that.

Apparently, in their opening, the Government insisted it was an integral part of their case.

THE COURT: They are going to argue that in summation, too, I assume.

MR. MACBETH: I certainly will, your Honor.

THE COURT: What about the order of summations?

MR. GOLDBERG: Doesn't matter to me, your Honor.

MR. MEYERS: As between the defendants, since I don't anticipate too much discussion on a factual point of view, I will lead off, and if it's agreeable to Mr. Goldman, I will give him the greater amount of time.

THE COURT: Mr. Macbeth, you want to go first then and rebuttal, is that it?

MR. MACBETH: Yes, your Honor.

THE COURT: All right. We will do it that way.

How long do you expect to be?

MR. MACBETH: On the initial summation, fifteen, twenty minutes, nothing extensive.

THE COURT: Depending on what happens with Mr. Law, we may be summing up and charging in the morning then. If he shows up, we may have the summations in the morning and the charge after lunch.

See you in the morning gentlemen.

Adjourned to November 18, 1975 at 9:30 a.m.)

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
David W. Major	296	323		
Roger W. Godino	334	341		
Vance Herlihy	385	401	401	
Chris Jackson	402			

EXHIBIT INDEX

Defendant Payden	Identification	In Evidence
C	315	
Government		
1, 2, 3		337

A B1

eljb 423

UNITED STATES OF AMERICA .

V. 75 CR. 421

DONALD PAYDEN, a/k/a COUNTRY,
BILLY VERNON

November 18, 1975
10:35 a.m.

oOo

(In the courtroom in the absence of the jury.)

MR. BELLER: Your Honor, my name is Daniel Beller. I am an Assistant United States Attorney. Mr. Vizcarrondo is ill, so I will be sitting in with Mr. MacBeth this morning.

THE COURT: Do we have any more witnesses?

MR. MacBETH: I can report on the situation with Mr. Law. As your Honor knows, the bench warrant was signed last night for Mr. Law, and the marshals told me of their attempt to find Mr. Law this morning. They went to 125 West 116th Street. There they spoke to Mr. Law's father, who appears to be the superintendent of the building, who told him that his son had not been there for--the last time he saw his son was two weeks ago at 117th Street and Lenox, very early in the morning.

He said his son Law had a girl friend with whom

he lived and he did not know what the girl friend's address was.

The marshals then stayed in the area for about another 45 minutes, then being around 6:00, at the time when Mr. Law's father had seen him two weeks ago. They were unable to locate him.

I further pursued the matter of the telephone number which the Probation Department had for Mr. Law and was informed by the Telephone Company that there is some kind of trouble or breakdown in that line. It is impossible to ring through to the number. That was the number at 125 West 116th Street, so that I think that has also been covered by the marshals going there this morning and attempting to locate Mr. Law.

THE COURT: All right.

MR. MEYERS: Your Honor, at this time I move for the withdrawal of a juror and the declaration of a mistrial, in view of the fact of the unavailability of a key witness to appear and testify in this particular case, that is, John Law.

THE COURT: No, I deny the motion. I believe that you had his name in sufficient advance time to arrange for him to be here, and Mr. Goldberg indicates that he personally served a subpoena on him for his appearance yester-

day; that the witness failed to appear. As soon as I was notified that on the application of the Government--or everybody, I issued a bench warrant which was attempted to be executed and failed because of the inability to locate the witness.

I think this witness just didn't want to appear in this case unless he was brought in here under duress or force or otherwise. Under the circumstances I deny the application.

MR. GOLDBERG: I join in that application.

THE COURT: Very well.

Do you have any further witnesses?

MR. MEYERS: The Government has concluded its case, I assume.

THE COURT: Oh, yes.

MR. MEYERS: No rebuttal.

THE COURT: Do all sides rest?

MR. GOLDBERG: Yes.

MR. MEYERS: Yes.

THE COURT: Does the Government rest?

MR. MacBETH: The Government rests, your Honor.

THE COURT: All right. You make the same motions that you made at the end of the Government's case, and you make it now at the end of the entire case, and I deny those

motions with an exception to you.

MR. MEYERS: First I'd like to move to dismiss the indictment on the ground that the Government has failed to establish the defendant Vernon guilty beyond a reasonable doubt. At this time I also want to renew all the motions that were made at the conclusion of the Government's case that I made on behalf of Mr. Vernon.

In that respect, I would also like to again emphasize the question evolved pertaining to Count No. 6, and that is on the question of possession. There's been discussion as to constructive possession. I think the evidence in this particular case pertaining to that count demonstrates actual possession on the part of Mr. Bell, so that the question of constructive possession does not arise.

MR. MacBETH: Obviously, aiding and abetting is also charged. Doesn't have to be stated in the indictment.

THE COURT: Mr. Meyers, your motion with respect to a judgment of directing the judgment of acquittal is denied with an exception. I have given you gentlemen all earlier this morning a copy of the charge that I propose to read to the jury. You will see in that, Mr. Meyers, that on Count 6 the Government relies upon the theory of aiding and abetting so far as Count 6 is concerned.

MR. MEYERS: I didn't quite hear your Honor.

THE COURT: I say I deny your motion. They go on the theory of aiding and abetting as far as Count 6 is concerned. You did see a copy of my charge beforehand. Was that furnished to you gentlemen?

MR. GOLDBERG: Yes, sir.

MR. MEYERS: Yes, sir. Except, I wanted to bring it to your attention some objections at this particular point to your proposed charge.

THE COURT: You can do that. I do this for you so that you can see what my rulings are in connection with the request that you furnished me. I ruled on Mr. Goldberg's yesterday because they were here and had been submitted to me yesterday, and you can see how I have incorporated a number of requests that he had, not in his language, but in my own.

There is only one thing in there that I would amend as far as I can see, subject to any further discussion. The charge on confidential informant, had presumed that the confidential informant had testified here. He has not testified.

Therefore, I will not read the second part of that specific charge.

MR. MEYERS: I wanted to bring that to your Honor's attention.

THE COURT: I will read the first part of it only. The balance of the charge, do you have anything else in connection with it?

MR. MacBETH: Two items, your Honor. First, the third element of the Pinkerton charge. I think it is correct in the law to say that he acted within the reasonable meaning, the defendant, under the conspiracy--I don't have the exact language--

THE COURT: Let me have it here.

(Pause.)

THE COURT: Third, where the crime charged in a particular count you are considering is committed in furtherance--

MR. MacBETH: The act is within the reasonable contemplation of the defendant within the conspiracy.

THE COURT: No, I will charge it as I have it.

MR. MacBETH: The next point is on the question of absence of witnesses. I think the defendants--

THE COURT: There are no absent witnesses involved here. Do you want me to charge absence of witnesses?

MR. MacBETH: I don't, but you have a page on absence of witnesses.

THE COURT: I don't intend to charge absence of witnesses. Any objection to that?

MR. MEYERS: No.

MR. GOLDBERG: No.

THE COURT: All right. I will remove that from here. It happened to be in here and I didn't know whether we were going to have that issue raised.

Anything else?

MR. MacBETH: The last point was the suggested charges Mr. Meyers produced this morning on entrapment. The Government takes the position that there is insufficient evidence in the record for a charge on entrapment. I don't know how your Honor intends to rule.

THE COURT: Yes, I don't know the issue of entrapment is properly before the jury with respect to the evidence produced, and I refuse to charge that.

MR. MEYERS: On the issue of aiding and abetting, I just had a few minutes to look the charge over; I think you indicate that the Government so far as Counts 2 and 3 are concerned is relying on the aiding and abetting statute.

THE COURT: Aiding and abetting on Counts 2 and 3 inasmuch as the defendants on trial here are concerned, it relies on aiding and abetting, and in Count 6 it relies on aiding and abetting insofar solely as the defendant Vernon is concerned.

MR. MEYERS: I am not concerned primarily with

the individuals involved, but--

THE COURT: Mr. Payden isn't involved in Count 6, and I am not going to get him in on aiding and abetting on Count 6.

MR. MEYERS: I understand. Except you say that the Government in Counts 2 and 3 rely on the aiding and abetting statute. I believe the Government in Counts 2 and 3 is relying on the section of possession of narcotics with intent to distribute, and therefore the aiding and abetting section, I understand fully that a person can be considered to be a principal without specifically setting forth--I am aware of that.

But the point I make is this: The aiding and abetting, if your basic crime is possession with intent to distribute, the Government must show that we aided and abetted in the possession of the narcotic.

THE COURT: I think that is covered.

MR. MEYERS: And not on the distribution of it. So therefore, I think there is a failure of proof on Counts 2 and 3 of any aiding and abetting in relation to the possession of the narcotics. This man did not have the dominion and control. He may have delivered it, but he did not have dominion and control.

THE COURT: That is a fact for the jury to find

as to whether or not he did. That is under my charge as to possession. I will charge that.

MR. GOLDBERG: I have at the close of the Government's case another motion in addition to the motions I wish to reiterate at the end of the Government's case. That is for severance in this case on the ground that my client Donald Payden's constitutional rights of confrontation has been violated and that there is no manner and no circumstance under which I have an opportunity of calling Mr. Vernon to the witness stand.

We dispute the statements purportedly made to Officer Jackson.

THE COURT: The motion is denied. Any motion for judgment of acquittal is also denied, with an exception.

MR. GOLDBERG: With regard to your charge and my proposed charge, from looking at your charge this morning, I just indicate three issues that I feel should be brought to your attention.

Namely, that in your charge on circumstantial evidence, no where in that charge is there any language or cautionary instruction that the jury must exclude such evidence unless it is supported through objective facts that amount to a reasonable hypothesis. What I am getting at is, my understanding on the law, your Honor, is that

in order for circumstantial evidence to amount to evidence, it would have to indicate more the inference of guilt or more the inference that the Government in this case contends it to be than it actually objectively or apparently would be on its face.

In other words, when acts are equivocal, which I submit in the instant case we have a number of, I feel that a charge indicating that in order to take this testimony or evidence for whatever it is worth, and offer it to the credible, circumstantial evidence, it must exclude a hypothesis of innocence.

In the instant case the overt acts do not, and the testimony does not, to my recollection, amount to evidence which would exclude every hypothesis of innocence.

As a matter of fact, my viewing of the circumstantial evidence or what purports to be circumstantial evidence in this case does not rule out the possibility and as I see it the probability that those acts were innocent, and are subject to more than one interpretation.

For this reason when you deny H-1 in my requests to charge, I take issue with that, and I hope to see it in your charge, but I don't see it in your charge.

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THE COURT: No. The charge that I have on circumstantial evidence, and as I have done, I have already ruled on that request and indicated that I will charge as I plan. Maybe we ought to take this up at the recess. This is something you may take up in connection with your summation. Because I have shown you my charge in advance, I don't want you to bring it up to the jury, the law that I am going to charge here, other than peripherally, reasonable doubt, et cetera. I do this as a courtesy to the lawyers so that they can adapt their argument in that respect, and I don't want it to be used as spouting the law by attorneys, but I assure you I will get into it and I don't want to.

Mr. Beller is going to sit here in Mr. Vizcarrondo's absence. Any objection?

MR. GOLDBERG: No, your Honor.

MR. MACBETH: At your suggestion I drew up Count 6 simply renumbering it as Count 4. If the defendant's would prefer to have it as Count 4 instead of Count 6, that is perfectly satisfactory to the Government.

MR. MEYERS: I think it makes for a more chronological order.

THE COURT: I thought so, too. All right. Bring the jury in.

(The jury entered the courtroom.)

THE COURT: Good morning to all of you. Again, I'm sorry for the delay. There was another matter here, as well as clearing up certain matters in this case that had to be attended to before coming in here this morning. I can report to you now that you have heard all the testimony in this case. All sides have rested, which means that, as I have indicated, the testimony has been concluded.

You are about to hear summations of counsel, to be followed by the charge of the Court on the law. Depending upon how long the summations take, you may not receive the charge until after the luncheon recess. Either way, we will have a recess after summations and before the charge, at which time the marshals will bring in luncheon menus and you can order sandwiches and liquid refreshments for lunch, which I would like you to eat in the jury room, which will save you a considerable amount of time going out to a restaurant, which will take more time.

I am not trying to rush you in anything at all, but I think it's a greater convenience to everybody involved and to you to have the lunch brought into the jury room.

Before we get to the summations and charge, I want to remind you, as I did at the outset of this case, that nothing counsel or the Court say with respect to a fact matter

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should be substituted for your recollection of what the facts were. What governs is your recollection of the facts.

Counsel's summations are supposed to be a review of the evidence that they believe has been testified through the testimony of the witnesses and the reasonable inferences that they can expect you to -- that they believe that you should draw from the facts that have been established here.

All right.

MR. MACBETH: Thank you, your Honor.

Ladies and gentlemen of the jury, you have now heard evidence form the witness stand for three days in the case against Donald Payden and Billy Vernon. I think that evidence clearly demonstrates that Billy Vernon acted as a go-between in narcotics deals in the purchasing and selling of cocaine, and that on two occasions Donald Payden acted as his supplier in narcotics deals, as his supplier of cocaine.

Let me start out by going directly to the heart of this case, to the events that took place on August 27, 1974. That was the day that Police Officer Chris Jackson bought about two ounces, or 53 grams of cocaine from Billy Vernon and Donald Payden. The evidence clearly shows that both of the defendants were responsible for that sale.

Let me go over the facts of that day with you

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slowly and carefully, over the witnesses that testified on the facts.

On the evening of August 27th, Chris Jackson went up to 116th Street to meet Billy Vernon. You heard Officer Jackson testify that he went there and that he met Billy Vernon in front of Jimmy Daniel's Bar. He told Vernon that he was interested in buying about two ounces of cocaine. Vernon asked him if he wanted to go back to Country, Donald Payden, the defendant here, or if he was interested in finding some of the Cuban's coke. Jackson told him that he was interested in trying the Cuban's cocaine. So they got into the Cadillac that Jackson was driving that night and they set off for the area of Broadway and about 148th or 150th Street to try and find Vernon's Cuban connection in that part of town.

Officer Jackson is the only witness to that conversation, but the meeting with Billy Vernon on 116th Street was seen by surveillance officers. Detective Herbert Wright testified here, and he was right there. He saw Jackson meet with Billy Vernon in front of Jimmy Daniel's Bar and he saw them get back into the Cadillac, and he followed them up to 148th Street and Broadway.

Dave Major was in the area of 116th Street and Lenox, and he testified that a little before 6:00 o'clock

on August 27th he saw Jackson's car arrive. He also followed Jackson's car up to about 148th Street and Broadway. When Vernon and Jackson got to 148th and Broadway, Vernon got out of the car and went into the Oasis Bar, looking for his Cuban connection. He came back to the car a few minutes later, and he told Jackson he couldn't find the connection in the bar.

Then he drove up to the Gallery Bar on 150th and Broadway, and again Vernon went into the bar looking for his connection. Again he came back empty-handed, and he said his connection wasn't there. So at that point he suggested to Officer Jackson that they go back to Country on 145th Street. Jackson agreed to that.

Once again, these futile efforts to find cocaine in the bars on Broadway were observed by surveillance officers. Herb Wright was able to get up close and he saw Vernon get out of his car and go into the Oasis Cocktail Lounge, then back to the car. And he saw the car drive on to the Gallery Bar. Once more he saw Vernon get out and go into that bar, come out, and go back to the car.

Dave Major was further away. He couldn't see people getting in and out of the car but he saw the car stop at the two bars.

From Broadway and 150th, Jackson drove to Payden's

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hangout at 356-1/2 West 145th Street. Payden was standing on the sidewalk. Billy Vernon got out of the car and he went over to Payden and he talked to him. And then they both went into the club at 356-1/2. Of course, Jackson saw that from the car and Detective Herb Wright saw it, too.

Vernon and Payden stayed in that club for some time. Then Vernon came out and he went over to Jackson in the car and told Jackson to come into the club. He told Jackson that Country had two ounces of cocaine which Jackson wanted to purchase, but that Country wouldn't deal while it was still broad daylight.

Jackson told you how he parked the car and went to the club and was frisked. And it was a very thorough frisk. And the third time over, they found the gun that he had behind his belt buckle. When they found that, of course they wouldn't let him into the club. He went back to the car and he drove the car around the corner, where he met some of the surveillance officers, and he put the gun in the trunk of the car. Then he parked the car and went back to the club.

He was in the club about fifteen minutes, talking to Billy Vernon, having a drink,waiting for Country to be ready to do business on the cocaine. Finally, Country called to Billy and all three of them left the club. As they came

out, Jackson walked off in one direction, Payden and Vernon walked off in the other, talking to each other.

Then Vernon went over to Jackson, and at that time he told him that he and Payden were ready to go and get the cocaine. And Jackson would have to put $400 up front, in other words, make a $400 down payment on the cocaine, which would be worth something like $1,600.

At that point Officer Jackson stood there on the street and he counted out the money to Billy Vernon. Vernon took the money and he went back to Country, Donald Payden. They talked for a minute. They got into Donald Payden's Mercedes-Benz, they made a fast U turn from the south side of 145th Street, and they went to St. Nicholas Avenue; they made a right on St. Nicholas Avenue and they got out of there as fast as they could get.

They roared up to the approach drive to the Harlem River Drive, and that was the last they were seen of.

Herb Wright was sitting in his car when Vernon and Payden came out of the club. He saw the separate conversations that Vernon had with Payden and with Jackson. He saw Vernon and Payden get into the Mercedes-Benz. He saw Payden behind the wheel speed off. He tried to follow them, but the traffic was thick and he lost them before they got to the Harlem River Drive.

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Dave Major also saw part of the transaction. He drove down 145th Street at the crucial moment, and he saw Vernon standing on the sidewalk and Jackson counting out the money to Vernon. He also saw the Mercedes there, and he saw Donald Payden standing on the sidewalk.

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Then he drove on further away from St. Nicholas Avenue.

Of course, a few minutes later, the word came through that the Mercedes had taken off and he did what he could to try and follow. He turned on a road parallel to St. Nicholas and went north, trying to catch sight of the Mercedes. He ran into a park and that was his chance of getting close to that getaway car.

MR. GOLDBERG: Objection.

THE COURT: Yes, the comment "getaway."

MR. MACBETH: John Crowe was on the other side of St. Nicholas Avenue when the transaction between Vernon and Payden was taking place. When Payden went and made the U turn and went up St. Nicholas, Crowe went after him, but Payden was going hell-bent-for-leather and Crowe lost him.

Payden knew what he was doing. He didn't want to have anybody following him when he went to pick up the drugs and he was successful. He got out of there as fast as he could. He got out through crowded traffic and it was impossible for those three or four surveillance officers who made the attempt to follow him to keep sight of him. Payden knew what he was doing and did it well.

About an hour and a half later, Vernon came back to

Jim Daniel's Bar and in the men's room he turned over the two ounces of cocaine to Officer Jackson. Jackson gave him another $1,200 for the cocaine and gave him $50 as an appreciation for himself.

You heard from the chemist that the cocaine went to the lab and was found to be 26 percent pure and weighed just about two ounces.

That is the outline of the events that took place on the 27th of August.

The events on the other days you heard about fall pretty much into much the same pattern as what you heard on the 27th of August.

On the 6th of August, the first occasion about which there was testimony, Officer Jackson was introduced to Billy Vernon by a confidential informant. A deal was struck by which Jackson would buy cocaine from Vernon. Again it was necessary to try and find Vernon's connection, and again Jackson and Vernon set out for near the area of 150th Street and Broadway. This time, as they were going along 145th Street, they waw Payden on the sidewalk. Rather, Billy Vernon saw Payden on the sidewalk. At that point, he turned to Officer Jackson and he asked whether Jackson would like to buy the cocaine from Payden, Payden had the best coke around for the price. Officer

Jackson agreed to that. He stopped.

Billy Vernon got out of the car and went over and talked with Payden. He came back to Officer Jackson in the car and told him the price of the cocaine was $800 and he went back to Country and had a further conversation.

Then he returned to the car again and he said he would have to go into the club with the money -- rather, he would have to go into the club to get the cocaine from Country's man, Country's lieutenant in the club, but he assured the officer it was still Country's cocaine, Country's drugs, that he could get.

Of course, it was important to assure him of that because he told the officer that Country had good cocaine and good stuff at a good price.

Vernon went into the club. Payden followed him. Payden stopped and got a good long look at Officer Jackson before he went in. He was measuring up his man.

On October 23, 1974, Jackson tried to make a last deal with Billy Vernon and Payden. This time he wanted the hand-to-hand deal with Donald Payden, but it couldn't be done. Vernon told him that Payden would not do it, and that he, Vernon, had had to do $50,000 worth of business with Donald Payden before he could deal with him hand-to-hand.

On October 3rd, Vernon did a deal with another connection, the Bell brothers, Lester and David. The Bells met with Billy Vernon and Officer Jackson in Vernon's own apartment and the cocaine was transferred to Jackson right there with Billy Vernon presiding over the scene. He made the introduction, he arranged the whole thing,he made sure it was carried out.

You have to judge the testimony in this case by your common sense. When you go to the jury room you can take off your coat and get down to the business of looking at the evidence closely and carefully, but you can't take off your common sense. You have to answer to yourself whether what you heard is true, and your own ordinary common sense about human affairs will be the best guide you have.

You have to ask yourself, were the witnesses on the stand during this trial telling you the truth?

The first thing you could see that those officers wanted to make a caes against Donald Payden. They could have given you something with a lot more fill in it.

Officer Jackson could have told you when he was in the club when none of the officers saw him that he had a conversation with Donald Payden, and that Payden told him this and that about one transaction or another. Officer Jackson didn't tell you that.

John Crowe, who sat on the witness stand and told you how the two black males had got into that Mercedes and taken off. He saw the two defendants sitting there at the table. He could have said, "Those are the men," but he didn't. He was too far away, he couldn't identify them, and he told it to you just the way it happened. He saw the two people get into that Mercedes and saw it take off.

The officers who were close up told you who the two people were that got into that car.

The officers here testified to what they saw and heard. Then weren't trying to make any case against Payden. The case against Donald Payden is made by things that Donald Payden did, by the actions that those officers described. That is what makes the case against Donald Payden.

Another thing you should thing about: Is Billy Vernon lying about where he got his cocaine?

There hasn't been a shred of evidence in this case, not a single shred of evidence to show that Billy Vernon has any kind of grudge against Donald Payden that would make him tell things to Officer Jackson to make up a story against Donald Payden. There isn't any sign, any reason why he should tell a story to Jackson about Payden that

wasn't true.

Nor, of course, is there any sign anywhere here that Vernon knew he was dealing with police officers, any reason why he shouldn't be on the level and straight from the shoulder with Chris Jackson.

Think about that after you have heard the summation from the defense and you go into the jury room. Can they give you any reasonable grounds to believe that Billy Vernon wasn't telling the truth to Officer Jackson? Is there anything in this case that would make sense with that kind of a theory? After all, what Billy Vernon wanted to do was simply to hide his source, pretend he was getting the cocaine from someone else when he had it himself; there would be a much simpler way for him to do it than the story, the testimony that you heard from witness after witness on that stand.

When they went up to those bars on Broadway, if Vernon already had the cocaine, he could have gone into one of those bars, hung around there for a few minutes, come out to Jackson and say, "I met my connection in there. I have the stuff," and sell him the cocaine right there. If all Vernon was trying to do was to cover up his source, that would have been the easy way to do it, not spend three hours going all over town looking for somebody.

Remember here, too, the purchase from the Bells. That took place right there in Vernon's own apartment. Vernon had the suppliers there, it was all out in the open. Vernon wasn't trying to hide the suppliers from Chris Jackson. When he dealt with someone like the Bells, he did it right there on the dining room talbe where everyone could see it, where Chris Jackson could see the whole thing, pour it out on the table, put it back into plastic bags with the playing card. The whole works right there in the open.

It was Donald Payden who wanted to deal cautiously and leave no traces in this case. He was a shrewd dealer. You don't get where Donald Payden got in the narcotics traffic unless you are that kind of dealer.

MR. GOLDBERG: Objection. I ask that that be stricken.

THE COURT: Yes.

MR. MACBETH: Donald Payden sold good quality cocaine. Remember what the chemist testified to. The cocaine that Donald Payden sold on that first deal was 35 percent pure, and the cocaine he sold on the second deal was 26 percent pure.

The cocaine that came from the Bells was only 5 percent pure. Donald Payden was selling much better cocaine than the Bells and he was careful, he was very careful about

his product and who he talked to and how he sold it. He wasn't going to talk to somebody he didn't know. He wasn't going to talk to any stranger, have any hand-to-hand dealings with them. He wouldn't deal hand-to-hand with Billy Vernon until he had done $50,000 worth of business with him.

MR. GOLDBERG: Objection.

THE COURT: It is the jury's recollection of the testimony that counts.

MR. MACBETH: He wouldn't deal in broad daylight. On August 27th before they could go off in that car, they had to wait until dusk had fallen and it was getting dark out. He didn't keep the cocaine with him.

On the first occasion Vernon had to go into the club and get it from Country's man. Country didn't keep it in his pocket.

The second occasion, they had to drive off in that Mercedes as fast as they could go to who knows where to get the drugs and he wasn't foolish enough to make the deliveries, bring it in, thrown it on the table where everybody could see it. He sent Billy Vernon for that and he sent him alone.

(Continued on next page)

This case shows that he was helping to distribute the narcotics and it shows that Donald Payden on two of those occasions was a supplier of narcotics.

When you get into the jury room, ask to take a look at the indictment. The indictment sets out the charges in this case and the Government has proved it. Read those over carefully. You will see that Count 1 charges Donald Payden and Billy Vernon with conspiracy, with a partnership to violate the narcotics laws and it sets out some of the acts that were done to further that partnership, to make it work and to make it profitable.

The meeting on August 6, 1974 is set out. The meeting on August 27th is set out. The get-away in the Mercedes is set out.

You have heard more--

MR. GOLDBERG: Objection.

THE COURT: I told the jury the indictment is nothing more than a charge. It's not evidence. It has nothing to do with any proof of guilt of the defendants.

MR. MacBETH: Ask yourselves if common sense doesn't tell you these deals are just what they look like, partnership between Payden and Vernon to deal in cocaine.

Count 2 charges Payden and Vernon with distributing 27 grams, about an ounce of cocaine on August 6, 1974.

You remember that August 6, 1974 is the date of the first dealing. Vernon got the cocaine, Country's cocaine, 356-1/2 West 145th Street.

Count 3 charges Payden and Vernon with distributing 53 grams, about two ounces of cocaine on August 27, 1974. August 27, 1974. That was the day that Vernon couldn't find the Cuban connection, that was the day Jackson went into the club with Vernon and Payden. That was the day Major saw Jackson counting out the money to Vernon on the sidewalk. That was the day that Payden and Vernon took off so fast in that Mercedes.

Finally, Count 4 charges Vernon with distributing 55 grams, two ounces of cocaine on October 3, 1974. That was the day the deal with the Bells was made, right there in Vernon's own apartment.

Before you go into the jury room to deliberate, Judge Gagliardi will tell you that you must be convinced of the guilt of the defendants beyond a reasonable doubt. A reasonable doubt, not whim or caprice or speculation. Ask yourselves whether there could be any reasonable doubt that Country, Payden, Billy Vernon were dealing in cocaine together. Can there be a reasonable doubt that on August 6, 1974 and August 27, 1974 they had cocaine and they sold it to Officer Jackson?

Can there be a reasonable doubt that on October 3, 1974, Billy Vernon had cocaine and was part of the group that sold to Chris Jackson?

By your oath as jurors, be fair, be impartial in this case. The Government is convinced that you will come back and find that beyond a reasonable doubt Donald Payden and Billy Vernon are guilty of the charges that have been brought against them.

Thank you very much.

THE COURT: Members of the jury, opinions of counsel do not count, nor their facts or conclusions drawn by counsel are not to be substituted for your own recollections.

I have already informed you there is no obligation upon the defendant to take the stand and present any evidence. I will charge you further in connection with my charge to you.

MR. MEYERS: Judge Gagliardi, Mr. MacBeth, my colleague Mr. Goldberg, ladies and gentlemen.

First I want to emphasize one particular item his Honor will discuss with you when he charges you and that is, under our constitution, the defendant, my client, need not have taken the stand. That is is constitutional right. As we indicated at the inception, at the very

moment this indictment was handed up, up to and including the point you go into the jury room and deliberate on your verdict, the burden is on the Government to establish beyond a reasonable doubt the guilt of my particular client, so you could draw no inference from the fact he didn't. That may have been my determination, there may have been legal factors. You are to draw no inference from the failure of my client to take the stand.

Now, I think this is one classic case, I believe, where you could use, perhaps, the old cliche that the mountain labored and brought forth a mouse and I mean a mouse in the sense of my client, Mr. Vernon, and I will attempt to demonstrate to you what I mean by that phraseology.

First of all, what is and what are the charges involved in this particular case. The first count says, in effect, that Mr. Vernon and the other defendant Mr. Payden entered into an agreement, a conspiracy, that is, that they were partners, that they conspired or agreed and the Government says that the agreement was started on or about August 1st of 1974, and keeping in mind that the first alleged incident is supposed to have occurred approximately five days later on August 6, 1974; that the alleged agreement which was to have started August 1st was then

implemented and in being between August 1st and August 6th of 1974.

Now the Government says that Mr. Vernon and the other defendant Mr. Payden entered into an agreement. To do what? To violate the narcotics law by possessing, distributing and what have you, the narcotics involved in this particular indictment.

Now, was there an agreement? What evidence was there upon which the Government based beyond a reasonable doubt that there was a partnership or a conspiracy? What evidence was produced, and by the way, Mr. MacBeth's recital of the evidence, it's your determination, it's your recollection of what the evidence is that governs in this case. Don't misunderstand, I am not implying in any way that Mr. MacBeth in any way misled you in relation to the evidence, because as far as the evidence is concerned, as far as what was the evidence, what did A, B or C testify to, it's your recollection that governs and it's not mine nor is it Mr. MacBeth's.

What was the evidence? First, on the very basic question, and this is the crux of the foundation of this particular complaint or indictment. What evidence was there that Mr. Vernon and Mr. Payden entered into an agreement to conspire? Well, Agent Jackson says on August 6,

1974 he accompanied a Mr. Law whom I will touch upon later on up to 116th Street. Mr. Vernon gets in the car and at that point there is no evidence that when they met at 116th Street, that they were going either in the direction of or to try to see Mr. Payden. All they said, if you recall the testimony, they were going up to 155th Street.

If there had been an agreement on August 1, 1974, as an automatic instinct--if I had my partner, I would go where he was, I would go where I could locate him. I wouldn't drive somewhere from 116th up to 155th Street. I would meet you at a certain spot at a certain time, but they continued on to somewhere around 145th Street and lo and behold purely coincidental, there was a man on the sidewalk and it has been hotly denied by Mr. Payden's counsel, but the Government says they stopped on 145th Street and Mr. Vernon exited from the car in the company of the so-called informant and they approached somebody who they say was Mr. Payden. A conversation of short duration is supposed to have ensued after which they then crossed the street and ultimately Mr. Vernon is supposed to have gone into this bar and grill, whatever it was, or night club, and exited, then had delivered a package ultimately to the undercover agent who was in the car and so on.

At that point, that is the only evidence you have that any agreement was made. Would that constitute an agreement, you and I? This isn't a retail setup, this isn't a sale of shoes or an ordinary commodity. This is something that requires secrecy, it requires a place, it requires a surreptitious approach and would we allow our transaction to take place on the sidewalk, given all that sort of thing.

So I say first the Government failed beyond a reasonable doubt to establish the existence of any agreement between Mr. Vernon and Mr. Payden.

Now, take the incident alleged of August 27th. Agent Jackson testified that there was no specific charge as to who they would go to in order to get the cocaine. In fact they were going to either a Cuban, either the Oasis Cafe or the Gallery Cafe. Here again, if I have my partner and I want to stimulate business for him, he would be my first approach. Why would I be even recommending my competitor's products? I want to sell this, I want to get it from my own partner. If we are partners, partners share profits. Why would I concern myself whether or not there was a Cuban, then go into an Oasis Cafe to look for somebody else, then go to a Gallery Cafe.

So again I say there is no evidence whatsoever

that an agreement, and that is what you must find beyond a reasonable doubt in order to establish a conspiracy that Mr. Payden and Mr. Vernon conspired to do an illegal act.

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Now, let's take the incident of October 3rd. Here again, this incident concededly did not involve any alleged Mr. Payden. It dealt primarily, the Government says, between Mr. Vernon and Mr. Bell.

Now, here again, if I had a partnership commencing August 1st of 1974 and I were in business with that man, wouldn't he even on October 3rd go back to my partner? Why would I deal with somebody by the name of Bell and ask him to supply? And even on October 3rd, the witness indicated that he wanted somebody else's cocaine, other than what he called, referred to as Payden. And I were a partner and I said look, if you wanted to do business with me I have got my partner who is waiting for this sort of thing, and I would deal with nobody else but my partner.

So on all three transactions you don't find a scintilla of evidence that demonstrates that an agreement, and that is what the Government must prove beyond a reasonable doubt existed, and this is from the testimony of the Government's witnesses.

Now, let's take Count No. 2. My client is charged with possession with intent to distribute the cocaine. That is the August 6, 1974 incident.

What was the position of my client, Mr. Vernon? Was he a partner of anybody? Was he a seller? A seller?

A seller, you have to have, and particularly in transactions such as this, you have to have a monetary means or the capital to effect a purchase. Was there any evidence to that effect? You have to have the ability to, if you can get it on credit, to get it on credit. If I am a seller I am going to derive some portion of the profits.

The Government can't have it both ways. They can't say that I was in partnership with Mr. Payden, which implies that if I am a partner I must necessarily share the profits. Do you believe that the role of Mr. Vernon, if there was such a role, was that of a seller? Or was he merely an introducer? Why was he an introducer?

You recall that insofar as the August 27th incident is concerned, he was given $50 by Agent Jackson. I think Agent Jackson described it as being for the introduction. And he went further than that, in appreciation of the introduction. Is that consistent with a seller? Is that consistent?

If you sold me the merchandise and title passed to me and I have given you the money for it, do I then on top of that give you a bonus? That is a direct sale. I assume if you sold it to me, that you have made a sufficient profit over and above any particular bonus, gratuity, whatever you may choose to call it, that I may give you.

So the very fact that a gratuity concedely was turned over by Mr. Jackson to Mr. Vernon indicates that he recognized that there was no agreement that ever existed between Mr. Vernon and Mr. Payden. And he also recognized the fact that Mr. Vernon was not the seller, that he was one of innumerable introducers that may exist, perhaps fortunately or unfortunately in the City of New York, predominantly unfortunate; that he was an introducer. And for that he got $50 gratuity.

Turn to the October 3, 1974 incident involving the Bells. Here again, Mr. Jackson gave Mr. Vernon $100 as a gratuity in appreciation again for the introduction. Does that relate back, indicate any conspiracy during that period? Does that indicate that Mr. Vernon was a seller, or does that definitely recognize the fact that what this particular defendant was, was that he introduced the individual who then consummated the sale?

We have a missing link, and it is a very definite and serious missing link in this particular case. You heard testimony that on August 6th of 1974 Agent Jackson was accompanied by an individual by the name of John Law. He was described, without any basis for it, other than a mere description, they said he was a confidential informant. Confidential informer? What is this confidential informer?

Can we determine, did we have an opportunity to determine, why were you a confidential informer? Why were you accompanying Agent Jackson at that particular--

MR. MacBETH: Objection, your Honor.

THE COURT: Yes, sustained.

MR. MEYERS: I believe you are entitled to determine what did actually transpire, not from Mr. Jackson's lips on August 6, 1974, who in the presence of Mr. Law said he had conversation with Mr. Vernon.

I think you are entitled to hear and let us attempt to determine what part Mr. Law played in this entire transaction.

MR. MacBETH: Objection, your Honor.

THE COURT: Sustained. I will charge the jury about absent witnesses.

MR. MEYERS: Possession. Let's take the August 6, 1974 incident. Assuming the facts to be so, as testified to by Agent Jackson that under the circumstances described that Mr. Vernon emerged from the bar and grill and delivered a package to the agent.

Did Mr. Vernon have possession? Of course he had physical possession, but did he have dominion and control over that package, or did it belong to somebody else, and was Agent Jackson aware of the fact that Vernon was not

the seller, that he was merely transmitting it, A and B over there, and that was that. I think your overall picture conclusively demonstrates that no matter how you rationalize it, it was very much apparent that Mr. Vernon was merely transmitting the package, and not selling it to Officer Jackson, but that he was acting as a transmitter or a deliverer of the package, and that he did not have dominion and control over that particular package, which denotes the question of possession.

The same thing applies to the incident of August 27, 1974. Here again, it was very apparent, when you couple it with the fact that after the transaction was completed where he physically turned over the package, and assume he did, to Agent Jackson, he received this bonus or gratuity. It's obvious from all the facts in a rational deduction that Mr. Vernon did not have possession in the sense that he did not have dominion and control over that particular package.

The October 3rd incident of 1974 which took place allegedly in the apartment of Mr. Vernon, what was the background on that?

If I recall the facts, and again I say to you it is your recollection of the facts and not mine, but I will try to see if I can reconstruct what the alleged

facts were as testified to by the agent. If I recall correctly, first of all, again there was no specific going to a Mr. Payden or anybody else. They pretty much left open, the agent said he wanted cocaine, and so forth.

Ultimately a David Bell enters the picture and he, Vernon, and Mr. Jackson, presumably, at least according to Agent Jackson's testimony, go back to what they referred to as Mr. Vernon's apartment on 116th Street. And if I recall correctly, there was someone there, and ultimately Agent Jackson and Mr. Vernon and they sat around the table.

Then, if I recall correctly, approximately an hour later or thereabouts, or 45 minutes later, David Bell appears in the apartment and he has the package, he has control over it, and it was his package.

He then places the material on the table, and then the discussion ensues between Agent Jackson and Bell.

Ultimately the transactionis completed and the money is turned over. Not to Mr. Vernon, but to Mr. Bell. Mr. Bell exists the premises and so on.

Then, I think the following day, Agent Jackson even the same day--at least he makes a complaint the next day, he determines that there was a shortage in the weight. If it were the product or the title or the ownership of Mr. Vernon, it was to Mr. Vernon that you'd complain.

You'd say look, I want my money back, I am short-weighted. But the testimony was that Agent Jackson went back and saw Lester Bell, who is the brother of David Bell. And by the way, the Bells are not here--

MR. MacBETH: Objection, your Honor.

THE COURT: Sustained.

MR. MEYERS: And he goes back to Lester Bell and he says, I have to see my brother, and so forth. Does that indicate possession in the sense of dominion and control over that package, or does that mean when you couple it again with the gratuity of $100 that was given on that day, does that indicate the true role if any of my client, Billy Vernon.

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I indicated at the inception I thought the Government had brought forth a mouse, and I indicated figuratively that it was my client who was the mouse, because were they after Mr. Vernon? If you take his entire alleged role in this picture, were they after him? With all the time, effort and energy, and they come up with Mr.Vernon? I say to you, ladies and gentlemen, that I think that the entire review of the evidence depicts the true picture that occurred in this particular situation.

I think you are entitled to draw certain inferences as to how the whole thing occurred in the first place. And I think that if you analyze the testimony you will find that the Government has failed to establish beyond a reasonable doubt the existence of the agreement, the existence of any conspiracy, and has failed to establish beyond a reasonable doubt the guilt of my client.

MR. GOLDBERG: Your Honor, Mr. Meyers, Mr. Macbeth, ladies and gentlemen of the jury:

We have now reached the third and the last stage of this proceeding. The two stages that follow, of course, are his Honor's charge and, ultimately, your deliberation, and consequently your verdict in this case.

I'd like to thank you for your attention throughout the course of this trial. I know there were pretty boring

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parts of it, and yet I saw you people listening to the evidence. I'd like you to pardon my use of notes at this time, but it helps me and I need them in order to make any summation.

The summation, or closing argument, is my opportunity to comment and logically argue about the evidence in this case. It is also my opportunity to argue about the lack of evidence in the case, and I'm going to argue about the lack of evidence in this case.

Of course, what I say is not evidence. What Mr. Macbeth said is not evidence. And even, with all due respect, what his Honor says to you is not evidence.

The only evidence in this case is that which is testified to from that witness chair or the exhibits that I might add you have the opportunity of examining when and if you desire to do so.

I have heard over the last three days, as you have, the evidence presented against Donald Payden, and I wish to caution you at this stage that there are two individuals on trial, and you are to be instructed that you are to consider each one. Each one is an independent individual and each one is entitled to that treatment.

I have been impressed with regard to this case for the lack of evidence more than the evidence I have seen.

In a criminal case there are very serious consequences, and our courts have formulated certain rules that you are to go by, and his Hone, when he instructs you on the law, I ask you to follow those rules. These rules weren't made up for Donald Payden. They weren't made up last week. They were made up throughout the last eight or nine centuries in our country. They weren't made to protect you, they weren't made to protect me. They were made to protect all of us. These rules didn't just come about for this case or for Donald Payden.

One of these rules is not guilt by association. Another one of these rules that is present is that one can't be convicted of a crime because he is present when a crime is committed, if it's committed. Another rule is we don't convict people based upon surmise, suspicion, hunch, speculation. And you were given an adequate opportunity to speculate in this case.

How many times did you hear the word "Mercedes"? How many times did you hear the figure "50,000? I say to you that it's clearly apparent why those terms of art -- and I say they are terms of art -- were used. They were used to influence you so that you could disregard the fabric and framework of our law, and be swayed to take a guess, to take a hunch, to go out on a limb.

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That is not our law, and I ask that you don't follow that type of thinking. Don't speculate. And if you did, you'd be in violation of your oath as jurors.

You can't walk out of this courtroom and say, you know, "I found him guilty because I think he is guilty." Donald Payden is not applying to your country club. He is not asking you to take him home. He is asking you for a fair trial, and he is asking you not to consider meaningless words subject to interpretation, and which have been proffered here to influence you, influence you without logical basis.

That type of thinking, the type of thinking that would cause you to feel that way, would cause you to feel, "Well, he drove a Mercedes, he made a getaway, he has to be a criminal," that has no place in a court of law. We don't try people in candy stores or luncheonettes or bar rooms. We have rules and these rules must be obeyed.

Mr. Payden is charged with three counts. He is charged with conspiracy to violate the federal narcotics laws, which encompasses the activity in August and September and October, and he is also charged with two substantive counts, specifically with distributing narcotics on two occasions, August 6, 1974 and August 27, 1974. That is what he is charged with. That is the issue in this

case. Ultimately, whether or not you are convinced, and these are the words, beyond a reasonable doubt of Mr. Payden's guilt in this case.

There are some false issues that have been interjected in this case. I will give you a perfect example.

Is the issue in this case whether or not the United States is to be protected from narcotics traffic? No.

Is the issue in this case whether or not Mr. Payden was subjected to a federal investigation? No.

I say, is that the issue in this case? Is that what it's all about? Is that the reason you have eight officers there, for you to determine whether or not these eight officers were there investigating? No, that is not the issue.

The issue is whether or not they have brought into this courtroom, perhaps from the work of those officers, evidence to convince you beyond a reasonable doubt of Mr. Payden's guilt. I submit to you they have not.

All of you were selected because you indicated you would be fair and impartial, you indicated that you would give Mr. Payden a fair trial, you would give the Government a fair trial. All I am asking you for is to abide by that promise. All I ask is that you give to Mr. Payden

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the benefit, the presumption of innocence that you would want, that I would want, that anyone would want. Give him that same standard, the standard of beyond a reasonable doubt that he is entitled to, and you and I are entitled to. The presumption of innocence will be mentioned by his Honor. Ask yourself whether or not this presumption which serves somewhat as a shield has pierced by the evidence that you heard from that witness stand. The evidence, mind you, not the suspicion, not the surmise. And I say to you that it hasn't.

And as long as it hasn't, that presumption surrounds Mr. Payden just as it does right now and just as it will unless you find that the evidence here has convinced you beyond a reasonable doubt of Mr. Payden's guilt.

Fear, sympathy, prejudice, they have no place in a court of law. We have all lived our lives for a good many years, I think there are between all of us here at least a few hundred years of experience. How could you not have certain feelings when you walk into this courtroom? How could you not feel certain chemistry when you sit where you are, and you look down here at Mr. Payden and myself and the other defendant on trial?

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When I speak of prejudice, I am not talking about the kind of prejudice that is racial prejudice. I am talking about the prejudice that you can't help from having by watching T.V., reading newspapers, and to give you a perfect example, if you were walking down the street and you saw a crowd in the middle of the sidewalk, and you saw a police officer walk over to that crowd and grab somebody by the collar, I say to you that you would have to, almost just human nature, you might say, "The guy must have done something wrong; otherwise why would that police officer be grabbing him around the neck?"

That is the type of prejudice I am talking about, the prejudice that results from certain acts, certain feelings, and I ask you to disavow that in this case.

This is not a civil case. Mr. Macbeth, in order to prevail, or for the Government in order to prevail, has more of a burden than just introducing evidence that just outweights the other side. He has to prove that evidence beyond a reasonable doubt to a moral certainty.

You have to walk out of here with that feeling. Nothing less than that feeling will suffice in this case or anyother case. What you would do for Donald Payden, I would hope is done for you, at least so far as offering him the opportunity of the same rules you would want.

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No better phrase -- no better principle, I should say, describes what I have said other than we are a nation ruled by law and not by men. I think in this context it means something.

Donald Payden has sat here and listened to evidence offered by police officers, by special agents. He said, "I am not guilty," in effect.

"You, Mr. Assistant United States Attorney, you have the burden of proof. You have the burden of proving beyond a reasonable doubt my guilt."

And I submit to you that from what you have heard, the Government has not met their burden.

Some of you may at this point say to yourself, "I have heard the evidence." How could you not hear it? How could you not at least start that thinking process over the last four days, but if you think and you still have an open mind about the events in the testimony and the conclusions in this case, I think what I say to you now, following this, will further convince you of Mr. Payden's innocence.

What has been the evidence in this case? What has been the overwhelming proof that has convinced you beyond a reasonable doubt of Mr. Payden's guilt?

You know, Mr. Macbeth, when he got up, in his

opening statement, he said to you, "This will be a simple case." I sat there and said to myself, "Let's hear what he has to say. Maybe this case is so open and shut that there would really be no need to go on."

Well, I submit to you that never was there more flimsy, unsubstantiated, uncorroborated evidence than you heard in this case. Never was there more evidence subject to so many interpretations. Yet those officers made their interpretation or the interpretation they feel they wanted.

You heard Mr. Macbeth say he was going to call upon different witnesses, teams. They were on the street; they were making surveillance. They were going to watch everything and do their job and present the evidence they gained while doing their job.

Well, has Mr. Macbeth offered to you the quality of evidence -- and we are not concerned with the quantity, with the number of witnesses here, but we are talking about the quality evidence that he promised he would give you when he indicated to you this would be a simple case.

What was his case? He called Chris Jackson, Vance Herlihy, John Crowe, Herbert Wright, Myles Harrington, David Major and Roger Godino, a police chemist.

This has not been a terribly long case. There is no need to dwell on the details of what took place on

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August 6th, August 27th, October 34d. I believe that they are fresh in your mind, but did these officers do their job?

This is not New York State. Federal agents, agents of the Drug Enforcement Administration, have the resources. They have the equipment. They are supposed to have the experience. They have the investigative techniques and they have the money to institute an investigation that resembles an investigation.

Did they do so in this case?

You may be saying to yourself, "This is the United States Government. The caption of this case says the United States of America v. Donald Payden. I mean, would the U. S. Government, these agents, color their testimony? Would they lie? Could they be mistaken?"

Well, if you think that Government agents, individuals who are indeed desirous of being promoted, who on occasion are overzealous, well, I think those factors speak for t[illegible]ves.

When I questioned some of the officers, I mentioned to them and asked them whether they made use of some investigative tools, tools that could have been used to make a better case, if there was a case, photographic equipment, monitoring equipment, powdered money, recorded serial numbers,

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fingerprint examination, chemical analysis to determine whether the drugs here, the drugs that were supposed to have been sold on August 6th and August 27th were from the same source, had the same base. No request was made to do that by the police officers.

MR. MACBETH: Objection.

THE COURT: I will permit it.

MR. GOLDBERG: None. Yet Mr. Macbeth characterized throughout the course of this trial that Mr. Payden is a shrewd individual, a shrewd individual who could not be apprehended, not be convicted, not be brought to trial, yet knowing this, knowing this, he is saying to you,"Convict him on what we have got. We didn't do our job, but convict him."

MR. MACBETH: Objection.

THE COURT: Overruled.

MR. GOLDBERG: "Convict him on what we have given you."

Has it been enough? Has what they have told you what they said occurred on those dates been enough to convince you beyond a reasonable doubt?

Think about how much easier it would be if they took this piece of tinfoil, or this piece of plastic to the fingerprint laboratory, just in the hopes, perhaps, of

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finding a fingerprint belonging to Donald Payden? Just think of what type of case that would be? It would certainly make matters different. It wasn't done.

Think of how it would have been if perhaps at about 9:00 o'clock or 8:00 o'clock on August 27th, 8:00 p.m., 9:00 p.m., just after the incident at 356-1/2 145th Street Mr. Payden was arrested and in his possession was currency which matched the serial numbers these agents say were recorded. That would make matters a little bit easier. That wasn't done.

Even a photograph, a motion picture, or any visual proof that what the Government agents say happened on 145th did indicate what had happened, might have indicated something further.

Mr. Macbeth got up awhile ago and talked about what Mr. Jackson did when he was shorted by the Bell brothers on, I forget the date, October 3rd. Do you know what he did? He went back to the Bell brothers who he just met on one occasion, and he said to them, "Hey, I have been shorted. Where is the rest of my dough?"

Why couldn't he go to Donald Payden and say, "Hey, that was really nice cocaine. That was good quality stuff you gave me," and wait for an acknowledgment? He didn't try it. He didn't make any effort to do so. And, remember, we

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are talking about incidents that occurred in 1974. This indictment is what month? April 1975.

What effort did you hear made during that period? Absolutely none.

(Continued on next page)

What went on in the area of 145th Street and St. Nicholas Avenue, and I am sure during the course of the trial you may have been bored by my mentioning St. Nicholas and 356-1/2 and Edgecombe. You heard these officers what they did that day. They were running helter-skelter in four to six automobiles all over this immediate area. Where did they situate themselves, well, in places where they couldn't even see what they wanted to see. As a matter of fact, from the evidence I heard, they didn't even see each other's automobiles when the evidence would indicate that they almost ran into each other on 145th Street on a few occasions.

A number of officers said they didn't even know what automobiles their fellow officers on that day were driving. That was the type of investigation launched in this case.

There were a lot of discrepancies in their testimony, which way the Cadillac was going after it left 150th Street area on St. Nicholas Avenue. You heard two different viewpoints. You heard Officer Wright say that Billy Vernon was in the Oasis Bar for five minutes and yet Officer Major said well, he just went in there for a moment and came right back out. Well, five minutes is not the same thing as a moment.

You heard a number of interpretations as to where the Cadillac used by Officer Jackson that day was parked. Jackson said it was double-parked right in front of 356-1/2. One officer places it between, not double-parked, but between the club and St. Nicholas. Another officer places it between the club and Edgecombe. You heard Officer Wright.

One officer places the Mercedes in one place and another officer in another place. I'm not telling you because of this you should find Donald Payden not guilty. That is not my argument at all. My argument is what went on on that day and why. Look at the facts that logically follow what happened.

These police officers had an obligation. Their obligation was to protect Officer Jackson that day. Do you need six to eight police officers to protect Officer Jackson that day?

MR. MacBETH: Objection.

THE COURT: I will permit it.

MR. GOLDBERG: That wasn't their only obligation. Their obligation was to also make surveillance, make notations, make observations. Did they do that? Did they satisfy you?

You would think on August 6th something happened

that now we are after a target, we would go up there and maybe get a van and put a camera in it, station ourselves in the building to take photographs. They knew where they were going, yet they never did anything like that.

I can understand, and it was clear when Mr. Jackson said the incident of August 6th, that was just as he called it, a stroke of luck, that is entering 145th Street and getting involved now, but August 27th was no longer luck. They had the tools but they didn't use them and Mr. MacBeth said these police officers were to make it easy for you, to make the case simple, but they didn't.

Ask yourselves this question, and I think here we have a real example of what went on that night, and Mr. MacBeth in his closing remarks never mentioned this because it was cut off at a certain point because he knew there is no answer. There is no answer to what happened at this particular time.

Do you recall the testimony about Mr. Vernon allegedly coming back to Jimmy Daniels Bar on 116th Street after the chase, after the get-away as Mr. MacBeth characterized it to the Bronx?

All the officers had communicated with each other. They at least said well, we lost the Mercedes, he took off, let's go back to 116th Street near Lenox Avenue, the bar

where Officer Jackson allegedly met Billy Vernon that evening. They all stationed themselves in that area yet not one officer can tell you how and under what circumstances Billy Vernon came back to that bar and you can bet your bottom dollar, if there would have been a Mercedes seen on 116th Street near Lenox Avenue, you would have heard about it.

What were they doing, sleeping? It wasn't until Officer Herlihy which I questioned him about, had he ever been to the Bronx before, did he know Donald Payden's address and he said yes. As a matter of fact, I was there that evening at about five or 6:00 p.m., I believe he said, yet not one officer, although there were six or eight officers involved on the 27th went up to the Bronx and perhaps might see something occur there. Perhaps something between Mr. Payden and Mr. Vernon.

Where were they, what were they doing? They were lost. They were already taken to 145th Street, 148th Street, 150th STreet, 116th Street. They were going, as Mr. Jackson said, getting everybody selling cocaine, get everyone that is a partner. That is why that happened, they didn't do their job and because of it, they haven't established proof.

I asked Mr. Jackson, what reason do you have for

not employing transmitting devices or tape recorders and I think he gave the best and truthful answer to that one. Since Watergate, since Watergate, they frown upon it. Because they could be trapped into what they were doing that night, what they were doing could be recorded and that couldn't happen, not with this thing.

His Honor talked earlier about your having to ask yourselves whether this type of evidence, and I am talking about the type of evidence that you heard these officers say they saw and were involved in, convinces you, independent of anything Billy Vernon was supposed to have said, that a conspiracy occurred.

In other words, the getting in the car, the, as they called, each time they testified, engaged in a brief conversation, another term of argument they use.

Are these the type of acts which would accrue criminality to Mr. Payden? Are you convinced by the statements allegedly made by Billy Vernon to Officer Jackson, are you convinced of that and are you convinced that the statements, and also convinced of how those statements were recorded or how they were remembered based upon what went on that night?

I ask you whether or not those statements could have been colored, colored to fit lack of proper police

work?

MR. MacBETH: Objection.

THE COURT: Sustained.

MR. GOLDBERG: The conspiracy is broken up into three elements. Proof that it existed, proof that a man knowingly entered it, joined it and proof that an individual unlawfully committed an overt act.

I ask you whether or not from what you heard in this case, are you convinced of these elements beyond a reasonable doubt and that is the standard you have to apply. No less standard.

If you are going to tell me through your verdict that Donald Payden is guilty because he was standing in front of 356-1/2 West 145th Street or he got into a car or he owned a Mercedes, then you are not listening to the evidence and you will not draw conclusions logically on that.

Mr. MacBeth said to you before, if the agents, specifically Agent Jackson wanted to make a case against Donald Payden--

MR. MacBETH: Objection.

THE COURT: Yes.

MR. GOLDBERG: You heard some talk in summation by Mr. MacBeth that Jackson could have easily said Payden

talked to him about narcotics and that mention was made in his presence, and I am talking about Jackson's presence by Payden of a conversation dealing with narcotics.

Mr. MacBeth said that Jackson never said that, but he did say that. He did say that because even on this witness stand he attempted to color his testimony.

MR. MacBETH: Objection.

THE COURT: I will permit it.

MR. GOLDBERG: I will quote Officer Jackson's testimony.

I asked him, "Did you overhear through any source whatsoever any conversation that day between Donald Payden, Billy Vernon on the subject matter being narcotics?"

That was the question I asked him and we were referring to the incidents on August 27th.

Mr. MacBeth said that Jackson would never say something like that, but I call your attention now--

MR. MacBETH: Can we have the pages on this?

MR. GOLDBERG: I just read page 116.

(Continued on page 484.)

When Mr. Jackson testified--page 27, Mr. MacBeth--when Officer Jackson was on the stand he said, "Approximately two minutes later"--this is inside the bar, inside 356-1/2, "I heard a voice from Donald Payden saying, Billy, come on, we are going to do the deal."

This, despite my questions, Mr. Jackson--Mr. Jackson, did you ever hear Donald Payden on any date refer to narcotics or narcotics transactions? That is Mr. Jackson. Mr. MacBeth would have you believe that movement of lips amounts to something sinister. He would have you believe that when two people, assuming it is true, are within feet of each other on the street, they are engaged in criminal activity.

This is the type of dangerous evidence presented in this case. Dangerous not only to Donald Payden but dangerous to anybody, anybody that can be brought to a Court of law for equivocal, to say the least, conduct.

Mr. MacBeth in his opening statement characterized this relationship between Billy Vernon and Donald Payden as a partnership and, as a matter of fact, he in his own words said, it wasn't an ordinary partnership. And you can bet your life it was no ordinary partnership here.

Because if that be the case, then the evidence he presented from Mr. Jackson and his surveilling officers

was that Billy Vernon was a partner with everybody in Harlem, in Washington Heights, Cubans, people in the Oasis Bar, people in the Gallery Bar, a fellow named Frank, Dennis Bell, Richard Bell, and Eddie Bell. He was partners with anyone. That is the testimony introduced by the Government. That is the testimony the Government expects you to buy and as a result come back with a verdict of guilty.

The only partnership that existed in this case existed in the eyes of the police officers, because they wanted a partnership. They wanted links--

MR. MacBETH: Objection.

THE COURT: No, I will permit it.

MR. GOLDBERG: They wanted links and they wanted Mr. Payden. They knew that two arrests are better than one; three arrests are better than two. And why not arrest everyone? Why not arrest 100 people if one person committed a crime or committed an act that would resemble a crime in their eyes?

Where is the arrangement between Donald Payden and Billy Vernon? Where is that corroborating evidence? Where is that independent evidence? Where is the rocky cocaine?

Mr. Payden was supposed to have sold quality

cocaine, stuffed with rocks. That was supposed to have been the testimony or the statement of Billy Vernon to the arresting officer. Was that corroborated? No. This is a partner, according to Officer Jackson, referring to Vernon and Mr. Payden, this is a partnership of trust.

There was no credit even alleged. As a matter of fact, Officer Jackson had to front the money. His partner couldn't give him time to pay.

Look at the packaging of this contraband. Does the contraband on August 6th and August 27th come in the same package? It doesn't mean that much, but it just could have been. And certainly one of those two pieces of evidence or the packaging could have been sent to the FBI for fingerprint analysis. They weren't.

Our law provides that accomplices' testimony must be supported by independent proof. There is a rationale behind that, because our law, by saying that is saying, the law doesn't trust accomplice testimony.

MR. MacBETH: Objection, your Honor.

THE COURT: I will instruct the jury as to the law.

(Continued on page 487.)

MR. GOLDBERG: You are being asked to take into evidence statements third-hand, purportedly attributed to Billy Vernon and said to Officer Jackson a year and three months ago. You are asked to not only accept those statements as having originally been true, but also to accept Officer Jackson's interpretation or ability to record those statements.

And if they wanted to do that, if they wanted to give you 100-percent clarity, you tell me, despite the fact that Mr. Jackson said it was dangerous to carry a Kel transmitter or a Nagra tape recorder, nobody is going to search his car. The chances of them searching his car, anybody searching his car and finding electronic or monitoring equipment were no less dangerous and a million times less dangerous than his carrying what he described was a .38 caliber police special. .38 caliber police special. That he walked around with, yet he wouldn't and couldn't and made no effort to put a recording device or monitoring device in his car so other officers could pick up the transaction, or preserve, if a recording device was used, that conversation for posterity and for you. That wasn't done.

Mr. Macbeth, in his last few remarks, said why would Billy Vernon, why would he make such statements?

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Why would he say what he said? Well, look at the facts.

Mr. Jackson was a stranger to him. He met him that day. As a matter of fact, he met him within an hour -- he met him an hour before these conversations took place. Are you convinced beyond a reasonable doubt that Billy Vernon could not have been disguising his own method, puffing his own product, protecting his own connection? Consider that in determining whether or not you believe beyond a reasonable doubt that those statements were true, and after that whether or not in fact they were recorded and repeated in this courtroom properly, word for word.

Consider this testimony. Consider all the evidence in this case. You have that obligation, and it is an obligation.

You should be able to feel when you come back after having deliberated that there was a sheet or a piece of cloth over Mr. Payden's face, and when you have your verdict and not have delivered it, but it's already made up in your mind and it's about to be rendered, that sheet is lifted up and it's a relative of yours, and you could still feel fair, still feel that you have done what you set out to do, render a fair and impartial verdict.

That is the test. These rules were not made for Donald Payden. They were not made for Billy Vernon. They

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were made for all of us, and you have got to apply those rules. Apply them fairly and not based upon surmise, speculation, bias or prejudice. I won't have the opportunity of addressing you again. Mr. Macbeth in our system has the right to rebut the things I have said. See if it responds to my questions.

I am certain that the evidence and the lack of evidence in this case exists in this record, and you, at any time while you are deliberating, have the opportunity to examine and hear that record. You can have any portion of this testimony read back to you if you desire. It is your prerogative, and, if need be, assert it.

You have got to ask yourselves: "Am I applying good conscience to the rules, the law, that I would want to apply to myself, my friends of my family?" That is the question.

The fact that Mr. Payden is under indictment, as his Honor will instruct you, is no evidence of guilt, and although you can take that instrument with you into the jury room and read it, that is not evidence in this case.

The only evidence in this case is what you heard. I cannot stress it any stronger. I am not asking you to pervert the law. I am asking you to uphold the law. And when I ask you for a verdict in this case, the only verdict

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in this case from the evidence that you have heard that can uphold the law is a verdict of not guilty.

I want to thank you again for your attention. Thank you.

THE COURT: It's no one's fault, except perhaps my scheduling, but I think I will have to change what we are going to do.

First of all we will take a short recess. You have been sitting here a considerable amount of time. I think you are entitled to stretch your legs for a few minutes. When you return, we will hear rebuttal summation by Mr. Macbeth.

I believe at that point I will send you out to lunch and ask you to return and then give you the charge after lunch.

If we had to send out for sandwiches, they wouldn't be here much before 2:00 o'clock, and I'm sure you don't want to wait that long. So we will take a recess now.

Don't discuss the case. Don't make up your minds.

(The jury left the courtroom.)

THE COURT: How long do you epxect to be, Mr. Macbeth?

MR. MACBETH: I think about ten minutes; perhaps

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a little longer.

THE COURT: I will charge about 2:00 o'clock. The charge will take about an hour, an hour and ten minutes.

MR. MACBETH: Your Honor, the Government does move, in light of the remarks during the defendant Vernon's summation, for a charge on absent witnesses, and that that charge contain a clear indication to the jury that in this case the witnesses John Law and the Bells were equally available to both parties.

There was a clear attempt on the part of the defendant Vernon to give the indication that the Government had control of John Law and the Bells and failed to produce them, when, as the Court well knows from the facts of this case, that is simply not true.

THE COURT: Yes, I was surprised to hear that argument made. I think it's highly regrettable, under the facts and circumstances as we know them to be, and the jury does not know them to be.

I think that was a very serious indiscretion to bring that up.

I regret some of the indiscretions that were paraded before me in connection with the trial of this case, but I guess there is nothing I can do about it at this time.

(Recess)

(In open court; jury present)

THE COURT: Mr. Macbeth.

MR. MACBETH: Ladies and gentlemen, this is the last opportunity I will have to speak to you in this case. I think there are a number of serious things that have to be said at this time.

The first thing I will do is turn my attention to the things Mr. Meyers said.

He made the contention that his client, Mr. Vernon, would have gone directly to Mr. Payden if he and Mr. Payden were in partnership. I think you have seen what happened in this case, that Billy Vernon had lots of suppliers. HE got drugs from Donald Payden, he got drugs from the Bells, he talked about the Cuban connection, he talked about other people.

There wasn't any need for Billy Vernon to simply go to Donald Payden. He had arrangements, agreements, partnerships with a number of people. I don't think there is any question that the evidence in this case shows he was in partnership with Donald Payden.

Now Mr. Meyers takes another tack. He takes a position that Billy Vernon wasn't really a seller of the drugs. He said he had possession of them, that he was transmitting them.

Listen carefully when Judge Gagliardi charges you on the law. I think you will see under the law as the Judge gives it to you, that right there Billy Vernon has admitted his guilt to the charges in this case. Listen carefully and remember exactly what Mr. Meyers said.

Mr. Vernon had possession and Mr. Vernon was transmitting those drugs. He was part and parcel of the distribution of the cocaine in this case. The evidence shows that and his own lawyer has stated it.

Let me turn to Mr. Goldberg's summation. Mr. Goldberg went on at much greater length, but I think you saw right away he didn't do what he did do on the trial, and on the trial Mr. Goldberg was painstaking, the way he went over every fact that the witnesses gave out in front of the jury.

He had Detective Wright on the stand and he went over how Detective Wright got from 145th over to 150th, and the turns, how long it took to get there. He went over it like an inch worm, where those cars were parked on 145th Street. He went over every conceivable jot and tittle in this case. Then he comes back on summation, and do you hear anything about the facts? You don't hear anything substantial about the facts from Mr. Goldberg.

There is no review of the evidence; there is no

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attempt to lay before you some coherent account of what those officers said that will make sense, that will in any way defeat the Government's case at this trial. There is none of that from Mr. Goldberg.

Instead, what does he do? He turns in two directions.

The next thing he tries to do is put the officers on trial here. One way or the other, by innuendo, he is making very serious charges against them. He says the officers put this interpretation or that interpretation on the evidence.

The officers weren't interpreting the evidence. They were giving you testimony as to what they saw in this case.

Then he goes on and says why, if one person was guilty, the officers would go ahead and arrest a hundred people. Nothing of that sort has gone on, but he suggests again and again the officers here are lying, they are coloring their testimony. Essentially, he is suggesting that they committed perjury on the stand.

I ask you, would those officers put themselves forward and risk the enormous penalties they would have for perjury that would ruin their careers, ruin their lives, their family, and reputations, in order to make a case

against Donald Payden to do anything like that? There is not a shred of evidence in this case that those officers did anything of the sort. There is nothing that came out on this witness stand or in the exhibits in this case that would indicate any of that to you.

In fact, right now, who were the witnesses that Mr. Goldberg himself called? He called the same officers back on the stand and if he really thought they were lying to you, would he have turned around and called them back on the stand to give testimony that he hoped in some way would be favorable to his client? I submit to you that is just an absurd thing, that in any way he would call them back as witnesses if he thought they were going to lie through their teeth to you in any way whatsoever.

Mr. Goldberg has a whole other series of false issues, that if you can't try the officers, try the investigation. He doesn't go back and look at the facts, look at what was said. He pulls every other kind of thing out of his bag that he can.

He talks about trying to show the drugs came from the same source. He talks about photographs. He talks about reports. You heard recorders. You heard what the officers said on the stand. They frisked Officer Jackson when he went into that club three times. That gun was behind

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his belt buckle and they found that gun. They would have found any recorder. You know perfectly well they would have found any recorder, and while they were willing to go ahead and do deals with him after they found the gun, if they found a recorder on him, that would be the end of that.

If those officers were out on the street taking photographs and flash bulbs popping on 145th Street in the evening, that would be the end of that deal. There wouldn't be anything going on here. There wouldn't be any evidence to have in this case if the officers went around with all the kinds of equipment you could possibly imagine.

There are other parts of it, I think if you look back at the evidence, that are perfectly obvious. He talks about fingerprints. You heard Officer Jackson on the fingerprints. You can't pick out fingerprints easily. It's difficult indeed to get them off the kinds of packages that the evidence came in.

The same thing from the chemist. First of all, I don't see any reason why you should assume that the narcotics sold three weeks apart comes from exactly the same source, but further, the chemist is very frank about it, it's very, very difficult to make any test of that sort So what you come down to, you come down to Mr. Goldberg putting the investigation on trial and putting those officers

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on trial.

I don't think what you have seen here and what you have heard here for three days, while you watched Mr. Goldberg cross-examine them as hard as he could, as long as he could, could give you any basis to feel this wasn't a competent investigation, an investigation which was made thoroughly, and there is no basis at all that suggests the officers in this case were in any way coloring their testimony, perjuring, anything but telling you what they remembered, what they saw, what they heard in the months of August, September and October of 1974.

And when it's all over, where does Mr. Goldberg stand? He asks you not to be prejudiced; then he starts playing for your sympathy. He starts talking about "think of your mother sitting on the witness stand."

Go back over the facts. A Mercedes and $50,000 aren't terms of art; they aren't some kind of arcane words the Government thought up. You know what a Mercedes is, it's a car you drive around in the street, and it's a car Donald Payden drove very fast that night on August 27, 1974, and you know what $50,000 is. You probably don't see it frequently, but you know perfectly well what it is.

There isn't any explanation about driving that car or about the $50,000 that Mr. Goldberg offers to you.

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When you come down to it, you have to put away that kind of play to sympathy, play to false issues, play to prejudice of any sort.

You have an important job to do here. It's important to the defendants; it's important to the Government.

When I said earlier on the Government wants to be fair and impartial in this case, I meant that.

Go into that jury room, look at the evidence, look at the heard evidence, look at what you heard from the witness stand, think about what can be brought out on cross-examination, where the attacks on cross-examination failed, but put aside all your fears and sympathies and apply the law as the Judge gives it to you.

I am confident when you do that, when you look at everything that went on in this case, you will see beyond a reasonable doubt, you will be convinced beyond a reasonable doubt Donald Payden and Billy Vernon engaged in narcotics traffic, they reached an agreement, conceived the fruits of that agreement, that they possessed and distributed narcotics on August 6th, August 27th of 1974, and then again in October, Billy Vernon had narcotics another time and again distributed it to Officer Jackson.

Go into the jury room, fulfill your oaths as jurors, and I am convinced that you will come out with a

verdict of guilty beyond a reasonable doubt, and that you will have done your job fully and properly.

Thank you very much.

THE COURT: Members of the jury, I am sorry to deprive you of your lunch at the expense of the Government, but I think this is the best way to do it. I ask that you do what you can. I know the difficulty of getting served promptly in a restaurant and getting seats around here -- we don't have too many of them, but do your best to be back within an hour at 2:00 o'clock. Do your best, but don't get indigestion over it.

Don't make up your minds about this case. When you return, I will instruct you on the law. Then you will be at liberty to discuss the issues fully at that time.

(The jury leaves the courtroom.)

THE COURT: Gentlemen, for the convenience of the jury, I intend to give to them a form of verdict which will be typed up as shown on this document that I have just handed you. If you have anyobjection to it, tell me.

We have seven separate counts here involving two separate defendants, and I think for the convenience of the jury when they read their verdict, it would be easier to read it from a form of verdict like that.

MR. MACBETH: No objection from the Government.

MR. GOLDBERG: No objection.

MR. MEYERS: No objection.

THE COURT: Be back promptly at 2:00 o'clock. I will charge promptly as soon as all the jurors are here.

(Luncheon recess)

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AFTERNOON SESSION

2:00 p.m.

(In open court; jury present)

CHARGE OF THE COURT

Gagliardi, J.

THE COURT: The reason for the announcement and the particular procedure of locking the door is so your mind will not be distracted by people walking in and out and things going on in the courtroom. I want nothing to interfere with your listening to me and giving me your strict attention as I charge you on the law.

You people are entering upon your final duty which is to decide the fact issues in this case. As I told you in my instructions at the beginning of this trial, your principal function during the taking of testimony would be to listen carefully and observe each witness as he testified on the stand, and it has been evident to me that as counsel pointed out, you have faithfully discharged this duty.

We have now reached the point in the case where all the evidence is presented and the closing arguments of the lawyers have been made. Shortly after I have completed my explanation of the applicable law, you will retire to deliberate upon your verdict.

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You are to perform your final duty in an attitude of complete fairness and impartiality. You are to appraise the evidence calmly and deliberately and, as was stated by me at the time of your selection as jurors, without bias or prejudice with respect to either the Government or to the defendants, as parties to this controversy.

The fact that this prosecution is brought in the name of the United States of America entitles the Government to no greater consideration than that accorded to any other party in the case. By the same token, it is entitled to no less consideration. All parties stand as equals at the bar of justice.

Your final role is to pass upon and decide the fact issues in this case. You, the members of the jury, are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, you determine the credibility of the witnesses, you resolve such conflicts as there may be in the testimony, and you draw whatever reasonable inferences that are to be drawn from the facts as you have determined.

My function at this point is to instruct you on the law, and it is your duty to accept those instructions and apply them to the facts as you determine them. The logical result of that application will be your verdict in

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this case.

With respect to any fact matter, it is your recollection and yours alone that governs. Anything that counsel either for the Government or the defense may have said with respect to any matters in evidence, that is, as to any factual matter, whether stated in a question, in argument or in summation, is not to be substituted for your own independent recollection. So, too, anything that the Court may have said during the progress of the trial with respect to a fact matter, or may say during the course of these instructions, is not to be taken in substitution of your independent recollection, which governs at all times.

Before we consider the precise charges in the indictment, a number of preliminary observations may be helpful.

In determining the facts, you are not to be influenced by rulings that the Court may have made during the trial. These rulings dealt with matters of law and not questions of fact. Counsel for both sides had not only the right but, indeed, the duty to press whatever legal objections they believed existed as to the admission of offered evidence. The Court's rulings on objections made either by the attorneys for the Government or attorneys

for the defendants are not to be considered by you.

Of course, as I told you at the outset, where I have sustained an objection to a question, you must not speculate on what the witness would have said had he been permitted to answer,nor may you draw any inference from the mere fact of the wording of the question or that it was asked.

Similarly, where any testimony has been stricken, it is not evidence and you are bound to disregard it.

You must remember, however, in ruling on objections the Court was deciding questions of law and not questions of fact.

I am aware that any judge can have a great deal of influence with the jury. If you think that you have gleaned some indication as to my opinion of the case,either from any questions I may have asked or from my expression or tone of voice, disregard it entirely. The Court has no opinion as to the veracity of credibility of the witnesses, or the guilt or innocence of these defendants. You are the judges of the facts and you are the sole judges of the guilt or innocence of these defendants. I am merely a judge of the law, and the fact issuesmust be decided solely and only within the framework of the evidence and the principles of law that apply.

Please don't single out any one instruction of mine as stating the law alone. Take them all into account after you have heard them all.

You are to consider only the evidence in this case which consists of the sworn testimony of the witnesses, the exhibits which have been received in evidence, and the presumptions which I will tell you about in these instructions, such as the presumption of innocence, but while you are to consider only the evidence in this case, you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw from the facts which you find have been proved such reasonable inferences as seem justified to you in the light of your own experience.

An inference is merely another word for a conclusion which reason or common sense leads you to draw from the facts that have been proved here.

In considering the evidence, you must remember, as I told you at the outset of the trial, that the indictment is only a formal method of accusing a defendant of the crime charged, and itself is not evidence against the defendant, nor is any weight to be given to the fact that an indictment has been returned against the defendants.

Generally speaking, there are two types of evidence

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from which a jury may appropriately find the truth as to the facts of the case. One is direct evidence. That is the testimony of an eyewitness, somebody who saw or heard something done is said. And the other is indirect or circumstantial evidence, which is the proof of a chain of circumstances, pointing to the existence or nonexistence of certain facts.

Generally, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with all the evidence in the case, both direct and circumstantial.

We have a rather common example that we use to illustrate what is meant by circumstantial evidence. Assume when you came into court this morning, as was the case, that it was a nice, bright, sunshiny day, that there were no clouds in the sky and the sky was clear and it wasn't raining. That is a direct observation. You could see what the conditions were, something you saw of your own observation.

I want you to assume on this morning we were in one of those courtrooms right off the entrance to the building that has no windows, and is either heated or cooled by the air-conditioning system, and assume we were in that courtroom, and after we had been in there an hour

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after we had come in and knew that the sun was shining outside, assume you saw a spectator come into the back of the courtroom and his hair was wet and his clothes appeared to be damp. Assume a few minutes later someone else came in and he had a hat in his hand and the hat was dripping water and his clothes appeared to be damp. A moment or two later, a third spectator comes in and he had a hat in his hand and an umbrella, and both were dripping wet.

Even though you couldn't look outside to see what the weather conditions were like, and while earlier you had come in and it had been a nice clear day, you might assume from the circumstances of these three people coming into the courtroom that it was in fact raining outside.

That is what we mean by circumstantial evidence, a chain of circumstances which leads you to conclude that a fact exists or doesn't exist and, as I indicated to you, the law makes no distinction generally between direct and circumstantial evidence.

I mentioned presumption of innocence. The defendants have entered a plea of not guilty to the charges in the indictment. Thus the burden is on the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant, for the law never imposes upon a defendant in a criminal case the burden or duty of calling

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any witnesses or producing any evidence. The law presumes a defendant to be innocent of crime. Thus, a defendant, although accused, begins the trial with no evidence against him, and the law permits nothing but legal evidence presented before you as jurors to be considered in support of any charge against a defendant. The presumption of innocence remains with the defendant throughout the trial and your deliberations until such time, if ever, that the jury is satisfied of guilt beyond a reasonable doubt.

Thus, the presumption of innocence alone is sufficient to acquit a defendant unless and until, after a careful consideration of all the evidence in the case, you, as jurors, are unanimously convinced of a defendant's guilt beyond a reasonable doubt.

I mentioned the words "reasonable doubt," and they will be interspersed in connection with some of my further instructions to you. I will define that to you after I have defined the specific charges here.

Before we get to the specific charges, I want to remind you of the witnesses who appeared here in the order in which they appeared. This has been a comparatively short trial. Counsel have seen fit in their summations to review those portions of the evidence which they felt were important for you to consider in your deliberations, and I

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don't propose to review any of the witnesses' testimony or to comment on it, but I would like to remind you, as I said, of the order of the witnesses.

The first witness we had was Chris Jackson, a police officer employed by the City of New York.

The second witness was Vance Herlihy, also a New York City police officer.

The next witness was John Crowe, Task Force investigator.

He was followed by Herbert Wright, a detective with the New York City Police Department.

The next witness was Myles Harrington, also employed with the New York City Police Department.

He was followed by David W. Major, special agent of the Drug Enforcement Agency.

And the final Government witness was Roger W. Godino, a chemist employed in the office of the Drug Enforcement Agency.

Following that, the defendant Payden then called Edward Magno, special agent of the DEA.

Vance Herlihy was recalled to the stand, and finally Chris Jackson was recalled to the stand.

Following that, both sides rested. That is, they concluded the evidence that was to be presented to you.

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With respect to the specific charges against the defendant, the first count, and I will read to you as we go along here, the first count charges that the defendants, Donald Payden, also known as Country, and Billy Vernon conspired to violate the federal narcotics laws.

Let me tell you right at the outset the fact that the indictment lists Donald Payden, also known as Country, the"also known as" is not to be taken by you in any way. It is a means of identifying him and there is no special connotation to be given to the fact that it's Donald Payden, also known as Country.

The second and third counts charge the defendants Vernon and Payden with distributing and possessing with intent to distribute certain quantities of cocaine.

And the fourth count names the defendant, insofar as we are concerned here, defendant Billy Vernon alone with distributing and possessing with intent to distribute a quantity of heroin.

The first count, as I said, is a conspiracy count, and the rest of the counts are what we call substantive counts.

The provisions of law, and it is not necessary for me to read them to you, but the provisions of law involved are Sections 812, 841(a)(1) and 841(b)(1)(a),

Section 21 of the United States Code which makes it a crime to possess or distribute or possess with intent to distribute a narcotic drug controlled substance, and in a schedule under one of the subdivisions of those acts, cocaine is defined as a controlled substance.

By another section of the law, it is a violation of the United States Code to conspire to violate the narcotics laws.

Each count contains a separate offense or crime, and each count must be considered separately by you. Each count of the indictment and the evidence pertaining to it should be considered separately. The fact that you may find a defendant guilty or not guilty of one of the offenses charged should not control your verdict as to any other offense charged.

In your deliberations, it is your duty to give separate personal consideration to the case of each individual defendant. As you do so, you should analyze what the evidence in the case shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against another defendant. Each defendant is entitled to have his case determined from evidence as to his own acts and statements, and any other evidence in the case which may be applicable to him.

In sum, the case as to each defendant as to each separate count must be decided upon the proof or lack of proof of each particular charge against that defendant.

The conspiracy count is divided into two separate parts. It is just one count, but there are two separate parts about it, and I will read the first section of Count 1 to you, and the second section which is overt acts, but which I will explain to you later on, which I will read separately.

The first section of Count 1 reads as follows:

"The grand jury charges that from on or about the 1st day of August 1974, and continuously thereafter up to and including the date of the filing of this indictment," which, incidentally was April 28, 1975, "in the Southern District of New York, Donald Payden, also known as Country, Billy Vernon, the defendants, and others to the grand jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(a) of Title 21, United States Code.

"2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule 2 narcotic drug controlled substances, the exact amount thereof

being to the grand jury unknown, in violation of Sections 812, 841(a)(1) and 841(b)(1)(a) of Title 21, United States Code."

That is the first half of the conspiracy count in the indictment.

Before you may find a defendant guilty of conspiracy as charged in the first count of the indictment, you must find the following three elements beyond a reasonable doubt:

First, that sometime between August 1, 1974 and April 28, 1975, the date specified in the indictment, an agreement or understanding existed between any two or more named conspirators to commit at least one of the crimes charged in the indictment, namely, the illegal possession with intent to distribute or distribution of cocaine in the Southern District of New York.

In New York, the Government must prove a conspiracy existed with respect to the distribution of narcotics.

The second element is that the particular defendant, Donald Payden or William Vernon, knowingly and wilfully became a participant in a conspiracy with knowledge of at least one of its criminal purposes.

And the third element is that one of the conspirators knowingly committed one overt act in the indictment at or about the time alleged in furtherance of the conspiracy,

and that at least one of these acts was committed in the Southern District of New York, which, for our purposes, includes Manhattan and the Bronx.

The first element -- I will define for you a conspiracy. Simply defined, a conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose. A conspiracy is an unlawful combination or agreement to violate the law. Whether or not the persons charged in the indictment accomplished what it is alleged they conspired to do is immaterial to the question of guilt or innocence. Thus, the success or lack of success of the conspiracy doesn't matter, for a conspiracy is a crime entirely separate and distinct from the substantive crime which may be the goal of the conspiracy.

A conspiracy has sometimes been called a partnership in criminal purposes, in which each member becomes the agent of every other member. However, to establish the existence of a conspiracy, the Government is not required to show that two or more persons sat around the table and entered into a solemn compact, orally or in writing, stating that they have decided to form a conspiracy to violate the law, detailing the plan, the means by which it was to be carried out.

Your common sense tells you, when men enter into

a conspiracy, much is left to unexpressed understanding. Conspirators usually do not reduce their agreements to writing or acknowledge them before a notary public, nor do they publicly broadcast their plans. A conspiracy is almost always characterized by secrecy.

In determining the existence or nonexistence of a conspiracy, it is not required that you find each and every one of the alleged co-conspirators joined in the conspiracy. It is sufficient if you find beyond a reasonable doubt that two or more persons in any manner, through any contrivance, impliedly or tacitly, came to a common understanding to violate the law.

In determining whether there has been an unlawful agreement, you may consider acts and conduct which are done to carry out a criminal purpose. Usually the only evidence available is that of disconnected acts on the part of the alleged individual conspirators, which acts you may find, when taken together in connection with each other and with reasonable inferences flowing therefrom, show a conspiracy or agreement to secure a particular result as satisfactorily and conclusively as more direct proof.

If, upon consideration of all the evidence, both direct and circumstantial, you find beyond a reasonable doubt that the minds of at least two of the alleged

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conspirators met in an understanding way, and that they have agreement, as I have explained a conspiratorial agreement to you, to work together in furtherance of their unlawful scheme alleged in the indictment, and that at least one of the conspirators did an overt act, then proof of the conspiracy is established. It is not necessary for the Government to prove the success of the conspiracy in order to establish a violation.

As I have indicated, a conspiracy is basically the agreement to violate the law, and it may exist even though the final objectives were never accomplished.

Now, you, I am sure, recall that I defined a conspiracy as a combination of two or more persons by a concerted action to accomplish an unlawful purpose. Thus, you, before you may find a conspiracy existed, must also find what the conspiracy intended to do was to violate one or more federal laws if they succeeded in accomplishing what they set out to do.

Finally, with respect to the existence of the conspiracy, the indictment alleges that the conspiracy commenced on or about August 1, 1974 and continued up to the filing of the indictment on April 21, 1975. It is not necessary for the Government to prove that the conspiracy started and ended on those specific dates. It is sufficient

if you find that in fact a conspiracy was formed and that it existed for some substantial time within the period set forth in the indictment and that at least one overt act was committed during that period.

A conspiracy, once formed,continues for as long as the evidence shows that the conspirators intended to continue. Such intention may be inferred from such activities, if any, of the conspirators which you find to be in furtherance of the conspiracy.

If you find beyond a reasonable doubt that the conspiracy charged in the indictment existed, you must determine who its members were. In determining whether a defendant became a member of the conspiracy, you must determine not only whether he participated in it, but whether he did so with knowledge of its unlawful purpose. Did he join with an awareness of at least some of the aims and the purpose of the conspiracy.

Knowledge is a matter of inference from facts proved. It is not necessary that a defendant be fully informed as to the details of the scope of the conspiracy in order to justify an inference of knowledge. A defendant need not know the full extent of the conspiracy and all of its activities. Mere association, however, with one or more of the conspirators does not make one a member of the

conspiracy, nor is knowledge without participation sufficient. What is necessary is that a defendant participate with knowledge of at least some of the purposes of the conspiracy and with the intend to aid in the accomplishment of those unlawful aims.

I instructed you preliminarily about this before, and I want to call it again to your attention:

In determining whether a conspiracy existed, you should consider the acts and declarations of all the alleged conspirators. However, in determining whether a particular defendant was a member of the conspiracy, you may consider only his own acts and statements. He cannot be bound by the acts or declarations of other alleged participants until you are satisfied beyond a reasonable doubt that a conspiracy existed and that the defendant you are then considering was one of its members. Your determination as to the participation in the conspiracy of each defendant must be based upon what you find to have been his own actions, his own conduct, his own statements or declarations, his connection with the acts and conduct of other alleged co-conspirators, and the reasonable inferences to be drawn therefrom.

For this reason, we took during the course of the trial evidence on a conditional basis subject to connection.

Thus, testimony concerning acts or statements of one alleged co-conspirator done or said in the absence of other alleged co-spirators, although received in evidence without limitation against the alleged co-conspirator who did the act or made the statement or admission, was admitted into evidence as to the alleged absent co-conspirator on a conditional or tentative basis.

If you find beyond a reasonable doubt that the conspiracy existed, and if you find also beyond a reasonable doubt that a particular defendant was one of its members, then the statements thereafter made, knowingly made, and the acts thereafter knowingly done by any other person likewise found by you to be a member of the conspiracy can be considered by the jury as evidence in the case as to any defendant found to be a member of the conspiracy, even though the statements and acts may have occurred in the absence of and without the knowledge of that defendant, provided such acts and statements were knowingly made and done throughout the continuation of the conspiracy and in furtherance of some object or purpose of the conspiracy.

Thus, statements of any conspirator which are not in furtherance of the conspiracy or which are made before its existence or after its termination may be considered as evidence only against the person making them.

If you find the conspiracy existed and a particular defendant knowingly participated in it, the extent of his participation has no bearing on the question of guilt or innocence. The guilt or innocence of a conspirator is not measured by the extent or duration of his participation. Even if he participated in it to a degree more limited than that of his co-conspirators, he is equally culpable so long as he was in fact a conspirator. If one joined the conspiracy after its formation and engaged in it to a more limited degree than other co-conspirators, he is equally culpable so long as you find beyond a reasonable doubt that he was in fact a co-conspirator.

Thus, each member of a conspiracy may perform separate and different acts at different times and different places. Some conspirators may play major roles while other may play minor roles. It is not incumbent that a person be a member of the conspiracy from its start. He may be held responsible for all that has been done before he joins and all that may be done thereafter durings its existence and while he remains a member.

By becoming a partner, he assumes all the liabilities of the partnership, including those that occurred before he became a member. Similarly, each conspirator need not know the identity or the number of all his confederates.

Conspirators may not have frequently associated together. One of the members of the conspiracy may know only one other member of the conspiracy, but if he enters into an unlawful agreement with that member of the conspiracy, he becomes a party thereto; nor is it necessary the participant receives a pecuniary benefit from his participation, as long as he in fact participated in it in the way I have instructed you.

The question is, did a defendant join the others with the awareness of at least some of the basic purposes and aims of the conspiracy. If so, then he adopts as his own the past and future acts of all the other conspirators.

A final word on the second element. I told you a conspiracy, once formed, is presumed to have continued until either its objective was accomplished or there was some affirmative act of termination by its members. So, too, once a person is found to be a member of a conspiracy, he is presumed to continue his membership therein until its termination, and the burden is upon the conspirator to satisfy you by further proof that he withdrew and dis-associated himself from it.

Getting to the overt acts which are not separate and distinct from the conspiracy, but are a part of it, you will recall that I said a conspiracy is divided into two sections. If you find beyond a reasonable doubt that the

alleged conspiracy existed, and that the particular defendant was a member of the conspiracy, you must then consider the third element, and that is the requirement of an overt act. The overt acts referred to in Count 1 are not separate charges. They are part of the conspiracy count, and you may not find a defendant guilty unless and until you are convinced beyond a reasonable doubt that at least one of the overt acts charged in the indictment was knowingly and wilfully committed by at least one of the conspirators and that at least one act was committed in the Southern District of New York which, as I told you, for our purposes is Manhattan and the Bronx.

The offense in the conspiracy is complete when the unlawful agreement is made and any overt act is done by a conspirator to, in the language of the state, to effect the object of the conspiracy. Thus, an overt act is an act knowingly and wilfully committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy.

(Continued on next page)

The overt act need not be a criminal act or an act which of itself constitutes an objective of the conspiracy. It may be an act which on its face is innocent, but it must be of such character that it furthers or promotes or aids and assists in accomplishing a purpose of the conspiracy charged in the indictment.

It is not necessary for you to find that all of the alleged overt acts charged in the indictment were committed, nor is it necessary that an overt act involve a particular defendant. It is enough if you find that at least one of the named overt acts in the indictment was committed by a conspirator in furtherance of the conspiracy.

The overt acts are specified in the indictment. There are seven in number and I will read that part of the indictment covering this.

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York.

1. On or about August 6, 1974 at approximately 9:45 p.m., Billy Vernon, the defendant met two people in front of 125 West 116th Street, New York, New York.

2. On or about August 6, 1974 at approximately 9:55 p.m., Donald Payden, also known as Country, and Billy

Vernon, the defendants, had a conversation across the street from 356-1/2 West 145th Street, New York, New York.

3. On or about August 6, 1974 at approximately 10:20 p.m., Billy Vernon, the defendant, possessed approximately 27.2 grams of cocaine in front of 356-1/2 West 145th Street, New York, New York.

4. On or about August 27, 1974 at approximately 6:25 p.m., Donald Payden, also known as Country, and Billy Vernon, the defendants, entered 356-1/2 West 145th Street, New York, New York.

5. On or about August 27, 1974 at approximately 7:10 p.m., Donald Payden also known as Country and Billy Vernon, the defendants, had a conversation in front of 356-1/2 West 145th Street, New York, New York.

6. On or about August 27, 1974 at approximately 7:15 p.m., Donald Payden, also known as Country, and Billy Vernon, the defendants, entered an automobile in the vicinity of 356-1/2 West 145th Street, New York, New York and drove away.

7. On or about August 27, 1974 at approximately 8:45 p.m., Billy Vernon, the defendant, possessed approximately 53.2 grams of cocaine at Jimmy Daniels Bar & Grill, 118 West 116th Street, New York, New York.

The three essential elements necessary to estab-

lish conspiracy are, first, that the conspiracy existed as charged in the indictment. Second, that the particular defendant knowingly and willfully joined that conspiracy and third, that one of the conspirators knowingly and willfully committed at least one of the overt acts set forth in the indictment and as I told you before, you may find a defendant guilty of the conspiracy count, but you must be satisfied that the Government has established each of these elements by proving them beyond a reasonable doubt.

I have used the words knowingly and willfully and I will use them again later in this charge but I thought this was an appropriate time to do it and I am not going to repeat this definition later on.

In defining the elements of a conspiracy and some of the other elements, I have used and will use the words knowingly and willfully. A person acts knowingly if he acts voluntarily and intentionally and not because of mistake or accident or other innocent reason.

The purpose of adding the word "knowingly" is to make sure no one will be convicted of a crime because of a mistake or other innocent reason.

A person acts willfully if he acts voluntarily and intentionally and with the specific intent to do something which the law forbids. That is to say with bad

purpose to either disobey or disregard the laws.

With respect to the substantive counts. The law makes the conspiracy a separate and distinct offense from what we call substantive offenses that are alleged to have been the object of the conspiracy. We have three separate substantive offenses. In two of which, both of the defendants are named. That is, Counts 2 and 3 of the indictment. In Count 4 which, only the defendant Billy Vernon is charged. The principles applicable to the substantive counts are the same but as I indicated to you, both defendants are named in the second and third and only the defendant Vernon is in the fourth.

Count 2 reads as follows: The grand jury further charges on or about the 6th day of August, 1974 in the Southern District of New York, Donald Payden, also known as Country, and Billy Vernon, the defendants, unlawfully, willfully and knowingly did distribute and possess with intent to distribute a Schedule 2 narcotic drug controlled substance, to wit, approximately 27.2 grams of cocaine.

Count 3 reads as follows: The grand jury further charges on or about the 27th day of August, 1974 in the Southern District of New York, Donald Payden, also known as Country, and Billy Vernon, the defendants, unlawfully, willfully and knowingly did distribute and possess with

intent to distribute a Schedule 2 narcotic drug controlled substance, to wit, approximately 53.2 grams of cocaine.

Count 4 reads as follows, which is solely against the defendant Billy Vernon: The grand jury further charges on or about the 3rd day of October, 1974 in the Southern District of New York, Billy Vernon, the defendant, unlawfully, willfully and knowingly did distribute and possess with intent to distribute a Schedule 2 narcotic drug controlled substance, to wit, approximately 55.5 grams of cocaine.

Before you may find either defendant guilty of the crimes charged, and I don't think it is necessary for me to repeat again that only the defendant Vernon is involved with Count 4 of the indictment, both are involved in Counts 2 and 3, you must be satisfied that the Government has proven each of the following three elements beyond a reasonable doubt.

First, that on or about the date charged as to each count, the defendants did distribute and possess with intent to distribute a narcotic drug controlled substance.

The word "possess" as used in this statute has its common every day meaning, and that is, simply to have something within your control. The law recognizes two kinds of possession, actual and constructive. A person who know-

ingly has direct physical control over a thing at a given time is then in actual possession of it. A person who though not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person, is then in constructive possession of it.

Under the law, possession may be sole or joint. If one person alone has actual or constructive possession of a matter, possession is sole. If two or more persons share actual or constructive possession of an object, possession is joint.

The word "distribute" in this statute means the actual, constructive or attempted transfer of a controlled substance.

The second element, if you find that a defendant did distribute and possess with intent to distribute the controlled substance, you must next determine whether or not he did so unlawfully, willfully and knowingly.

I had previously set forth the definition of the words knowingly and willfully.

With respect to the offenses charged in these counts, the law requires that specific intent be proved beyond a reasonable doubt before a defendant can be convicted and the third element, if you are satisfied that

the first two elements of the offenses charged have been proved beyond a reasonable doubt, you must then determine whether or not the substances contained in Government's Exhibits 1, 2 and 3 were in fact a narcotic drug. In this connection, I will instruct you as a matter of law, cocaine is a narcotic drug as specified in Schedule 2 of the appropriate law.

With respect to each defendant's involvement in the counts in which they are charged, that is Counts 2 and 3 in which both defendants are charged and Count 4 with respect to only defendant Billy Vernon is charged, the Government relies upon a statute which reads in relevant part as follows:

Whosoever commits an offense or aids, abets or counsels, commands, induces or procures its commission, is punishable as a principal.

This means that not only is the person who actually commits an illegal act, that is, the principal punishable, but anyone who aids or abets him in committing that illegal act is likewise punishable. Accordingly, you may find a defendant guilty of the offense charged if you find beyond a reasonable doubt that the offense was committed and that a defendant aided and abetted in its commission. To aid and abet does not mean just knowing that a crime

is being committed, even if one is present during its commission. That is not sufficient. In order to find that a defendant aided and abetted another to commit a crime, you must be satisfied that he knowingly in some substantial measure associated himself with the venture, that he participated in it as something he wished to bring about, that he sought by his action to make it succeed.

In other words, if one fully aware of what he is doing plays a significant role in facilitating a transaction prohibited by law, he is equally guilty with the person who directly performs the illegal act even though the latter played a greater or much larger role in the perpetration of the crime.

The evidence of a defendant's participation may be circumstantial from which you may conclude that a defendant is an aider and abettor, was a participant in a crime charged.

A single act may come within the prohibition of the wording of the aiding and abetting law. Whether one aided and abetted another to commit a crime must be determined solely on the aider's and abettor's own conduct, acts and statements.

In addition to the principles that I just explained, with respect to Counts 2 and 3, that is, those

two substantive counts in which both defendants are named, the Government relies also on an alternative area of proof.

You may recall, I am sure you do, that in connection with the finding the elements of a conspiracy, I told you a conspirator is liable for the acts and statements of his co-conspirators provided they were within the scope of the unlawful agreement as he saw it and were made during the pendency of the conspiracy and in furtherance of its objectives.

Similarly, a conspirator is liable for a substantive offense committed in furtherance of the conspiracy or its objective even though the particular conspirator did not himself physically perform all the specific acts constituting the substantive offense charged. Under this theory of proof, before you may find a defendant who did not physically perform the acts specified in Counts 2 and 3 guilty of the substantive offense charged in either of those counts, you must find beyond a reasonable doubt that the crime charged in the particular count you are considering was committed by a member of the conspiracy.

B3 Second, that the particular defendant you are considering was a member of the conspiracy and, third, that the crime charged in the particular count you are considering was committed in furtherance of the conspiracy

or as the particular count you are considering was committed in furtherance of the conspiracy or as its objective.

This concludes my charge as to the specific offenses charged in the indictment. Before sending you to your deliberations, there are a few more general comments I must make.

You have been very attentive and you haven't squirmed in your seats. If you feel like moving around a moment or two to get your second wind, feel free to do so. I know it if difficult to sit through all this length of time. I wouldn't consider it at all impolite if you do happen to move around a bit in there.

I have used the words reasonable doubt and there is some merit to say I should have put it in the earlier part of the charge and there is some merit in saying I should put it in at this particular point.

I told you earlier you should consider all of my instructions here and perhaps I put it here because you were so interested in knowing what reasonable doubt is near the end of the charge and that it might help to get your interest back if it has flagged a little and I know that it hasn't.

In describing the various elements, the elements of the various offenses, I told you the Government must

establish each of those elements by proof beyond a reasonable doubt and you, naturally, ask what is a reasonalbe doubt. The words almost define themselves. That there is a doubt founded in reason arising out of the evidence or the lack of evidence. It is a doubt which a reasonable person has after carefully considering all of the evidence. A reasonable doubt is not a vague or speculative or imaginary doubt. It is not caprice, whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not the sympathy for a defendant. A reasonable doubt is a doubt which appeals to your reason, your common sense, your experience and your judgment. It is a doubt which would cause a reasonable man or woman like yourselves to hesitate to act in relation to your own important private affairs. Mere suspicion will not justify conviction. Suspicion is not a substantive evidence, nor is it sufficient to convict if you find that the circumstances merely render an accused probably guilty.

On the other hand, it is not required that the Government must prove guilt beyond all possible doubt, but the proof must be of such convincing character that you would be willing to rely and act on it in the important affairs of your own life.

In sum, a reasonable doubt exists when after a

fair and impartial consideration of all the evidence before you, you can candidly and honestly state that you do not have an abiding conviction that the defendant is guilty of the charge.

During my explanation I used the words "knowledge" and "intent" as an element of the crime and I also used "knowingly" and "voluntarily."

Knowledge and intent exists in the mind. As we all realize, it is not possible to open up a person's head to see what goes on in the mind of the person. Therefore, the only way that you have of arriving at a decision on these questions is for you to take into consideration all the facts and circumstances shown by the evidence and to determine from such facts and circumstances whether the requisite knowledge and intent was present. Knowledge and intent may be inferred from all the surrounding circumstances.

Again I earlier told you that one of your most important duties would be to assess the credibility of witnesses. You as jurors are the sole judges of the credibility of the witnesses. You and you alone must determine what weight their testimony deserves.

I gave you earlier on some guidelines I thought might be helpful to you and I will expand and repeat some

of those instructions: You should not be influenced by the number of witnesses called by either side. The weight of the evidence is not necessarily determined by the number of witnesses testified on either side. Rather, you should consider all the facts and circumstances in evidence to determine where the truth lies.

In assessing credibility, you should carefully scrutinize the testimony given, the circumstances under which each witness has testified and every matter in evidence which tends to indicate whether the witness is worthy of belief. The degree of credit to be given a witness should be determined by his demeanor, his relationship to the controversy and the parties, his bias or impartiality, the reasonableness of his statements, the strength or weakness of his recollection viewed in the light of all the other testimony and attendant circumstances in the case and the extent to which if at all each witness is either supported or contradicted by other evidence.

How did the witness impress you? Did he version appear straightforward and candid or did he try to hide some other facts? Is there a motive to testify falsely?

In passing upon the credibility of the witnesses, you take into account inconsistencies or contradictions as to material matters in his own testimony or any conflict

of that of another witness. Also any inconsistencies or omissions in prior testimony or any prior statement of material matters as to which he may have testified upon the trial. Inconsistent or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently. An innocent misrecollection like failure of recollection is not an uncommon experience. A witness may be inaccurate, contradictory or untruthful in some respects and yet be entirely credible in the essentials of his testimony.

In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or unimportant material and whether the discrepancy results from innocent error or willful falsehood.

If you find that any witness has testified falsely, you can do one of two things. You can either reject all that witness' testimony on the grounds that it is all tainted by falsehood and that none of it is worthy of belief, or, you can accept that part which you believe to be credible and reject only that part which you believe to be tainted by falsehood.

Should you find that all or part of a particular

witness' testimony was false, you may not, of course, infer that the opposite of that testimony is true unless there is evidence to that effect. Any testimony rejected by you as false is no longer in the case so far as any finding that you may make is concerned.

You will recall I told you that an inference was a conclusion which reason or common sense leads you to draw from the facts which you find have been proved. Thus, a finding of fact may not be established merely be a negative inference arising from your disbelief and rejection of any testimony.

In passing upon the credibility, the ultimate question for you to decide is, did the witness tell the truth before you. It is for you to say whether his testimony at this trial is truthful in whole or in part in light of his demeanor, his explanations and all the evidence in the case.

Again at the outset of the case I told you that the law does not require a defendant in a criminal case to testify or present any evidence on his own behalf. The defendant is not required under our laws to prove his innocence. He is presumed innocent at all times and through the entire trial unless and until you feel the Government has established his guilt beyond a reasonable

doubt.

For these reasons, a defendant need not take the witness stand and testify in his own behalf. The fact that a defendant did not testify at this trial does not create any presumption for or against him and I charge you that this fact must not weigh in the slightest against him nor shall this fact enter into your discussions or deliberations in any manner.

There has been testimony here with respect to the use by agents of the DEA of the services of a person referred to as an informant. These services are availed of by Government agents to obtain leads to persons suspected of violating the law. Whether or not you approve the use of an informant in an effort to detect law violation, does not enter into your deliberations. To that end, there was a comment made by counsel in their summations with respect to absent witnesses.

With respect to an absent witness the law is as follows: If it is peculiarly within the power of either the prosecution or the defense to produce a witness who could give material testimony on an issue in the case, the failure to call that witness may give rise to an inference that his testimony would have been unfavorable. No such conclusion should be drawn by you with regard to a witness

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who is equally available to both parties or where the witness' testimony would be merely cumulative. Both sides have the right to interview witnesses at any time before or during trial and both sides have the right to subpoena or request witnesses to appear in Court and there is no testimony before you as to the availability or inavailability of a particular witness about whom mention was made.

The jury will also bear in mind, however, the law never imposes upon a defendant in a criminal case, the burden or duty of calling any witnesses or producing any evidence.

Just a few more items. In your deliberations, please do not discuss the question of possible punishment. That is a matter that rests on my conscience and my conscience alone because the judge and the judge alone is the one who has the obligation of imposing sentence when and if guilt is determined. If you discuss it among yourselves, you are encroaching upon my function and I ask you not to do it. Your function is to consider the facts, to determine the facts and my function is to pass upon the law and in the event of conviction, to impose sentence.

If you find on all the evidence that the evidence respecting a defendant leaves a reasonable doubt as to his

guilt, you should not hesitate for a moment to return a verdict of acquittal as to that defendant.

However, on the other hand, if you find beyond a reasonable doubt that the law has been violated as charged, you should not hesitate because of smypathy or because of any other reason to render a verdict of guilty.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto, that is, your verdict must be a unanimous one. It is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement if you can do so without violence to each individual's judgment. You must decide the case for yourselves and do so after an impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations, do not hesitate to reexamine your own views and change your opinions if convinced it is erroneous, but do not surrender your honest conviction as to the effect or weight of evidence solely because the opinion of your fellow jurors or for the mere purpose of returning a verdict. You are not partisans. You are judges, judges of the fact. Your sole interest is to ascertain the truth from the evidence in the case.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the marshals signed by your foreman or by one or more members of the jury. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing and the Court will never communicate with any member of the jury on any subject touching upon the merits of the case other than in writing or orally here in open Court.

You will note from the oath about to be taken by the marshals that they too as well as all other persons are forbidden to communicate with you in any manner whatsoever with any member of the jury on any subject touching the merits of the case. Bear in mind that you are never to reveal to any person, not even to the Court, how the jury stands numerically or otherwise on the question of guilt or innocence of an accused unless and until after you have reached a unanimous verdict.

It is proper to add the precaution that nothing said in these instructions, nothing in any form of rhetoric prepared for your convenience is to suggest or convey in any manner any intimation what a verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibilty of the jury.

You may have available for you a copy of the indictment and I have prepared a form of verdict which will make it convenient for you to report your verdict when you return to the Court and since Donald Payden is the first named defendant, the formal verdict will be on Count 1 we find the defendant Donald Payden, and I have left it blank and you will return whatever it is and it goes right through Counts 1, 2 and 3 with respect to Donald Payden and Counts 1, 2 and 3 and 4 with respect to Billy Vernon.

Counsel have the right to take any exception to any instructions that I have given to you or request me to charge you further on the law and I think it would be convenient if you will just remain there and we will go inside the robing room.

(In the robing room.)

MR. MEYERS: I want to see if I understand your charge in relation to the failure to call a witness that is equally available. I am not certain as to the terminology of that. May I see that?

THE COURT: Yes.

(Pause.)

MR. MEYERS: On the basis of the charge I have now read, I take exception. I think in the peculiar

circumstances pertaining to the witness John Law, one, I would maintain--

THE COURT: You take exception to it.

MR. MEYERS: Yes. I would like to state for the record that under the facts, the witness was not under the equal control of both.

THE COURT: I said there is no evidence in this case as to availability or unavailability of a witness.

MR. MEYERS: Your paragraph seems to imply if he was equally available to both--

THE COURT: I didn't make any such statement that he was equally available to both. All I said was you will recall before you summed up I had indicated there wasn't going to be any reference made to it and I was not going to charge the absent witness in my charge and then in summation you violated--not violated, but you did what you said you weren't going to do.

MR. MEYERS: I was not given an opportunity to develop the purpose of referring to Mr. Law. All I got as far was to say that Mr. Law accompanied the individual and I stopped. I think I should have been given an opportunity--

THE COURT: Let's not go into that now.

MR. MEYERS: The third thing is--

THE COURT: You except to my charge in that

respect?

MR. MEYERS: The third thing that I want to get into the record, a subpoena having been served, I think the jury should have been informed of the fact that we did make an effort.

THE COURT: You have the right to bring that out before the jury if you wanted to.

MR. MEYERS: You wouldn't let me bring anything out with respect to Law.

THE COURT: You were never stopped from putting the witness on a stand saying that he served a subpoena to return on a certain date and he did not appear.

MR. MEYERS: It is in the record.

THE COURT: There is no testimony before this jury.

MR. MEYERS: I think the exhibit was in evidence.

THE COURT: It was not.

MR. MEYERS: I offered it in evidence.

THE COURT: Any other exceptions?

MR. MEYERS: No.

THE COURT: Any exception or request?

MR. MacBETH: Only with respect to the new assistant.

THE COURT: I don't think that is necessary.

MR. MEYERS: I offered it in evidence.

THE CLERK: It was marked for identification.

B5 THE COURT: All I charged this jury was that there was no evidence before them to indicate the availability or unavailability of the confidential informant.

(In open Court.)

THE COURT: All right ladies and gentlemen, members of the jury, I have no further instructions to give you except I do have--I am fortunate to report that we have an intact jury of 12 that we started off with and it is my unpleasant duty to sever the two alternates from the balance of the jury.

I do want to express my appreciation for everybody being here, for your courtesies to us. Your function was most important, just as important as every other juror in this case. As I say, we are very lucky that no one has been incapacitated and we still have the intact jurors here.

I am told you are to report back tomorrow morning to the central jury room.

(The alternates were excused.)

THE COURT: Swear the marshal.

(The marshal was sworn.)

THE COURT: Have you looked at a copy of the

indictment?

MR. GOLDBERG: Yes, your Honor.

MR. MEYERS: Yes, and the form of verdict.

MR. GOLDBERG: Yes, your Honor.

THE COURT: The jury may begin their deliberations.

(At 3:25 p.m., the jury commenced its deliberations.)

THE COURT: What exhibits are there?

MR. MacBETH: The cocaine exhibits.

THE COURT: They won't go in.

Where is the subpoena?

MR. MEYERS: I offered it in evidence.

THE COURT: Exhibit C, page 415 is marked for identification.

MR. MEYERS: I offered it today, your Honor, before the summation.

THE COURT: I don't recall that.

During Mr. Major's examination--

MR. MEYERS: Your Honor, here is the subpoena.

THE COURT: It is marked for identification.

MR. MacBETH: Your Honor, I think page 416 is the correct page. There seems to be a confusion. There seems to be two Exhibit C's.

THE COURT: It was marked for identification. It was never received in evidence.

MR. MEYERS: I asked it be marked in evidence. I certainly would not have marked it for identification. I didn't intend to produce Mr. Goldberg and have him testify.

THE COURT: There is nothing before this jury about the fact that he had been subpoenaed or otherwise, so I say on the basis of the record before me, there was nothing to show the availability or unavailability of this witness.

All right, gentlemen, I request that you remain here--do you intend to remain here?

MR. GOLDBERG: Yes.

THE COURT: If you go anywhere off the floor, let Mr. Matarese know where you will be.

(Recess.)

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2 (4:10 p.m., a note was received from the jury.)

3 (In the courtroom in the presence of the jury.)

4 THE COURT: I have your note, and your note reads

5 as follows:

6 "1. Copy of law regarding conspiracy and 2,

7 copy of testimony (Jackson)."

8 I am sure you got the impression that we were

9 getting copies of the testimony of the witnesses and since

10 you knew I was reading from a book you must have assumed

11 that you were permitted to receive these matters in the

12 jury room. It doesn't happen that way, I'm sorry to tell

13 you. I can't give you a copy of my charge, nor can I give

14 you a copy of the testimony of Police Officer Jackson in

15 that form.

16 If you do want the entire charge on conspiracy

17 reread to you, I will do so. If you want all of Jackson's

18 testimony reread to you, it will be done here in open

19 Court. If you want the whole of it, as I said, you are

20 entitled to it and it will be done.

21 On the other hand, if there are any particular

22 parts of either the charge on conspiracy or particular por-

23 tions of Police Officer Jackson's testimony, either direct

24 or cross examination or with respect to a particular point,

25 if you will make that known to us we will be able to fish

it out for you and have you back in here and read that.

Why don't you go back in the jury room and in the light of the fact you can't physically have the charge or the testimony, why don't you go back in there and send me another note exactly what you want to know.

(The jury left the courtroom.)

THE COURT: Mark the note Court's Exhibit 1.

(Court's Exhibit 1 marked.)

THE COURT: I assume if it is necessary to re-read what they want, it will take the next two or three hours to do that.

MR. GOLDBERG: Is there any program of what we are going to do if they jury hasn't reached a decision by 6:00?

THE COURT: I haven't made any decision with respect to that. We will just have to wait and see how we go and what kind of progress they may be making. The chances are if we keep them here tonight, I would send them out for dinner around 6:30.

MR. GOLDBERG: You would keep them here this evening most likely?

THE COURT: Not necessarily. I just don't know. We will either go for dinner or go home around 6:30. If I decide to send them home, I will probably send them home

around 6:30, 7:00 and they can be back here at 9:30 in the morning.

Jackson's entire testimony runs from page 16 in the minutes to page 186.

MR. GOLDBERG: That is not counting when I called him back again.

THE COURT: I assure you it will take at least an hour and a half.

(Recess.)

(At 5:40 p.m., a note was received.)

(In the courtroom in the absence of the jury.)

THE COURT: I have a note from the jury. The jury requests the reading of Officer Jackson's testimony of the events on August 27th. We ought to get together and agree what that is, if we can. Direct, cross, redirect, recross.

(Pause.)

THE COURT: It starts on page 24.

MR. MacBETH: Yes. Starts again at page 30.

THE COURT: Goes through 30, the bottom of page 30. Agreed?

MR. GOLDBERG: Is this just the direct, your Honor?

THE COURT: They asked for a reading of Officer

Jackson's testimony of August 27th. I propose to give them the direct, the cross, the redirect and the recross. There is nothing further on direct?

MR. MacBETH: I believe not.

THE COURT: Let's go to cross.

(Pause.)

THE COURT: Nothing in Mr. Meyers' examination.

MR. MEYERS: I think there was, your Honor, on November 13th.

THE COURT: Well, find it. I don't see anything here. If you find it, show me.

MR. MacBETH: The only possibility, your Honor, may be page 50 where there is a reference to the DEA 6, the report prepared for August 6th and August 27th.

THE COURT: All right. That is about all I can see, too. Mr. Goldberg, can you find yours?

MR. MEYERS: Mr. Goldberg, I believe on November 13th, beginning at page 51--

THE COURT: 51, no.

MR. MEYERS: I think it continues on dealing with October 23rd.

THE COURT: August 27th is what they want. I see nothing further in that first set.

(Pause.)

THE COURT: Page 123. There is only one question on page 123 that I see. I think on page 123 we have question on line 14, question and answer.

Page 126, line 14.

MR. GOLDBERG: Are you indicating, your Honor, that the portion between 123 and 126--

THE COURT: Doesn't relate to the events of August 27th. We skip to 126, line 14, and then continue to page 142, line 20.

MR. MacBETH: Yes, your Honor.

THE COURT: Mr. Goldberg?

MR. GOLDBERG: Yes, your Honor.

THE COURT: All right.

MR. MacBETH: Excuse me, your Honor. It continues beyond that. That was the last time he saw Mr. Payden, at line 20. Then he goes on about Mr. Vernon, and that is still August 27th.

THE COURT: You go to page 147, line 18.

MR. GOLDBERG: On 149 I ask him a general question alluding to prior dates.

THE COURT: That is not the way the question is worded, Mr. Goldberg.

MR. GOLDBERG: For example, when I ask him, at no time during this period, which I am talking about August,

did you see him, meaning Donald Payden, with any drugs. That relates to that date.

THE COURT: I don't believe that is what is called for by the jury. If they ask for some more, I will give it to them.

MR. MacBETH: The bottom of page 152, line 20.

THE COURT: Yes. Page 152, line 20.

MR. MacBETH: Ending at 153, line 3.

THE COURT: To page 153, line 3.

And on redirect examination, page 158, line 11 to line 16.

Page 159, line 3--

MR. MacBETH: It should be to line 16 on page 160. The question at line 12 seems to be a typographical error. It should have been the 27th of August.

THE COURT: Where?

MR. MacBETH: Page 160, line 12, how does that compare to the size of the pistol you were wearing on the 27th of October--I think that should be August.

THE COURT: I think that is correct, gentlemen. Page 159, line 3 to page 160, line 13, with the correction noted on line 12 that the word should be August.

Page 175, line 24 to page 176, line 6.

MR. GOLDBERG: It still continues after line 6

on page 176.

THE COURT: To where?

MR. GOLDBERG: On line 12 there is also--

MR. MacBETH: The objection is sustained.

THE COURT: The objection is sustained there, Mr. Goldberg.

Then on page 179, line 3 to--

MR. GOLDBERG: Your Honor, I believe there is 128 also.

THE COURT: It says August 24th there.

MR. GOLDBERG: There is no August 24th.

THE COURT: I know there isn't.

MR. GOLDBERG: Do you think it is a typographical error?

THE COURT: I am not sure whether it is or isn't. It is hard to tell. That doesn't have anything to do with the events of the 27th, Mr. Goldberg. They want to know whether he was under surveillance between those periods of time and not that day. Page 179, line 3, that should be August 27th--well, it is corrected later on. But from there.

Page 179, line 3 to page 181, line 16.

MR. MEYERS: Page 180, beginning on line 9.

THE COURT: I am reading all of 180. Through

181, line 16.

MR. MacBETH: Your Honor, I think that starting at line 10 on 181 he turns to the transaction with the Bells rather than that of August 27th.

B2 THE COURT: There was an objection. Line 10 is --yes, I guess line 10 is out on page 181, line 10 to--

MR. MacBETH: In fact, there is never really an answer to the question on line 3. The objection is sustained.

THE COURT: That's right. So we should stop at line 2, on page 181. That is page 179, line 3 to page 181, line 2.

Page 183, line 9, to page 184, line 11. I think everything after that is objected to and sustained. Is that the end of the recross? Yes.

MR. GOLDBERG: There is another question. 185, line 10.

THE COURT: I don't know that that relates to the transactions or events of August 27th, Mr. Goldberg.

MR. GOLDBERG: We are asking for a comparison.

THE COURT: But that doesn't answer the jury's question. I won't give that. That is the end of the testimony.

What about when you put him back on the stand,

Mr. Goldberg?

MR. GOLDBERG: I believe I did ask him a couple of questions on that.

THE COURT: Let's get to it. On page 402, so we go to page 403, line 24.

MR. GOLDBERG: Are you going to read the stuff on 402?

THE COURT: No. To page 407, line 15. That is the end of his testimony. That is the end of all the testimony, isn't it?

MR. MacBETH: Correct.

THE COURT: To recapitulate, page 24, line 2 through page 30, line 3. Page 50--

MR. MacBETH: It would go a little further than line 3, your Honor. Line 22, I believe.

THE COURT: Yes, to line 22.

Page 50, line 6 to line 9, isn't it?

MR. MacBETH: Yes.

THE COURT: And we go to page 123, line 14, and further on as we have described. All right. Bring the jury in.

(The jury entered the courtroom.)

THE COURT: Sorry for delaying you, but it was necessary for us to pick out the pertinent parts that we

thought you wanted read.

The note reads: "The jury requests a reading of Officer Jackson's testimony of the events of August 27th."

We have gathered what we believe is the testimony that you want both on direct, cross examination, redirect and recross examination. It will be read to you now, and at the conclusion of it or if at any time before we reach the conclusion of it you say you have heard all that you want to hear, you let me know and at the conclusion of it I will ask you if that is what you want.

(Record read.)

THE COURT: Some of the jurors and Juror No. 1 have indicated to me that that is sufficient reading, to the end of page 174. Is that correct? Are you all satisfied with that?

(The jury indicated in the affirmative.)

THE COURT: I told you that you could conduct your deliberations in any manner in any way that you would like. If we are going to order dinner, it is going to take us a half hour to make arrangements before we get a restaurant to accommodate you. We have several choices.

You can continue deliberating now, go to dinner, and come back and deliberate; or you can continue for a little more, and then suspend for the night and come back

in the morning.

Why don't you retire to the jury room and indicate to me what your preference is about ordering dinner in a restaurant nearby here, because if we are going to do that, we have to make arrangements properly so it won't be too late before you get there. Why don't you retire and indicate to me your preference.

(The jury left the courtroom.)

THE COURT: Mr. MacBeth wants to read into the record the 3500 material that is supplied.

(Government's Exhibit 4 marked for identification.)

XXX

(In the courtroom in the presence of the jury.)

THE COURT: I have your note which reads, "We would like to adjourn for dinner and come back and make our decision."

We will comply with your request. We have called the restaurant and I have been advised that another marshal or two will be up to assist you in going and you will be going out very shortly. I asked them to make it the closest restaurant here so that you wouldn't have too far to walk. Let me suggest to you: You are going into a public restaurant. Don't discuss the case over there. Don't get your minds off it, but don't discuss it publicly.

Talk about whatever you'd like, but don't discuss this case in public.

When you come back, you resume your deliberations. If you leave phone numbers that you want called and the message you want left, if you will give it to the marshal, he will give it to Mr. Matarese and he will make the phone call.

I suggest you be back here about 8:15.

(The jury left the courtroom.)

THE COURT: I think they are going to Aldo's, so don't go there.

(7:05 p.m. - dinner recess.)

(8:30 p.m. - the jury resumed deliberations.)

(At 9:35 p.m., a note was received.)

(In the courtroom in the presence of the jury.)

THE COURT: Your note reads as follows: "Please clarify item number 2 of the indictment, specifically, concerning possess with intent to distribute. Thank you."

I believe this is what you have in mind. I charged you before, before you may find either of the defendants guilty of the crime charged in this count of the indictment you must be satisfied that the Government has proven each of the following three elements beyond a reasonable doubt.

First, that on or about the date charged the defendants did distribute and possess with intent to distribute a narcotic drug controlled substance.

The word "possess" as used in this statute has its common every day meaning, and that is simply to have something within your control. The law recognizes two kinds of possession: Actual and constructive. A person who knowingly has direct or physical control over a thing at a given time is then in actual possession of it. A person who, though not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a thing either directly or through another person is then in constructive possession of it.

Under the law, possession may be sole or joint. If one person alone has actual or constructive possession of a matter, possession is sole. If two or more persons share active or constructive possession of an object, possession is joint.

And the word "distribute" in the statute means the actual, constructive or attempted transfer of the controlled substance.

The second element, if you find that a defendant did distribute and possess with intent to distribute the controlled substance, you must determine whether or not

he did so unlawfully, willfully and knowingly.

Does that respond to the question that you submitted to me? I see a lot of affirmative nods. All right. You may retire.

(The jury left the courtroom.)

THE COURT: I assume that was the question and I didn't come and ask you because I knew that was what they wanted to. No objection?

MR. MacBETH: No, your Honor.

MR. GOLDBERG: No, Judge.

MR. MacBETH: Can we put on the record I have shown Government's Exhibit 4 for identification to the counsel for defendant Vernon and defendant Payden. Both counsel agree that they have seen that material during the course of the trial.

MR. GOLDBERG: Yes.

MR. MEYERS: Yes.

(Recess.)

(At 10:20 p.m., in the courtroom in the absence of the jury.)

THE COURT: Gentlemen, it is now as I can see by the clock, 20 minutes after 10. I don't want to punish this jury. On the other hand, I have not had a note from them since they returned for their last request. It is

my thought to call them in now and ask them whether they want any more time or whether they want to go home for the night and come back in the morning. If they want to go home for the evening tonight, I shall see whether or not they have arrived at any verdict as to either defendant on any count.

MR. MacBETH: That is acceptable to the Government, your Honor.

MR. GOLDBERG: Your Honor, I think at this late hour that type of alternative given to the jury might result in them being forced to return a verdict. For that reason I will except to that. I would think that they might be better off being fresh tomorrow and then deliberate.

THE COURT: I don't think it is forcing them to do anything. It is recognizing the late hour. I think it is the only sensible thing to do at this time. I want to put no pressure on anybody. I want them to have adequate time to reach their deliberations. But there is a saturation point in the evening beyond which--

MR. GOLDBERG: No, your Honor. What I am saying is they just ought to be told to come back tomorrow and continue further deliberations.

THE COURT: No, I don't think that that is the way to do it. But you have expressed your view.

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MR. GOLDBERG: My objection is noted.

THE COURT: Yes. Ask the marshal to bring the jury in.

MR. MacBETH: Your Honor, just for the record, I have shown defense counsel Government's Exhibit 4 for identification, which is a list of the 3500 material and they have agreed that it was turned over to them properly during the course of the trial.

MR. GOLDBERG: I have only conceded that the 3500 material that I received is on that list.

(The jury entered the courtroom.)

THE COURT: Members of the jury, I called you back here in view of the lateness of the hour, one, to solicit your opinion as to whether you wish to continue deliberations any further this evening or suspend for the evening and go over until tomorrow morning.

How many of you would prefer to remain to continue the deliberations?

(No response.)

THE COURT: Well, I don't see a single hand raised, so I believe that that indicates that you'd like to go home for tonight and come back tomorrow morning.

Who desires to go home now and come back in the morning?

(Hands raised.)

THE COURT: That seems to be the vast majority. I will address this to the Forelady, and don't respond other than yes or no. Have you arrived at any verdict on any count against any defendant?

THE FORELADY: No.

(The remaining jurors responded in the affirmative.)

THE COURT: May I suggest this to you. It appears that you apparently have. Would you retire to the jury room and see if you have agreed upon the verdict as to either defendant on any count, and be prepared to state that verdict when you return, if you have arrived at that.

(The jury left the courtroom.)

(Pause.)

(At 10:35 p.m., the jury entered the courtroom.)

THE CLERK: Madam Forelady, has the jury agreed upon a verdict as to the defendant Donald Payden on Count 1?

THE FORELADY: Yes, they have.

THE CLERK: The verdict, please.

THE FORELADY: The jury finds on Count 1, we find the defendant Payden guilty.

THE CLERK: On Count 2?

THE FORELADY: On Count 2, we find the defendant Payden not guilty.

On Count 3, we find the defendant Payden guilty.

On Count 1, we find the defendant Vernon guilty.

On Count 2, we find the defendant Vernon guilty.

On Count 3, we find the defendant Vernon guilty.

On Count 4, we find the defendant Vernon guilty.

THE CLERK: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded.

You say you find the defendant Payden guilty on Count 1, not guilty on Count 2, guilty on Count 3.

You find the defendant Vernon guilty on Count 1, guilty on Count 2, guilty on Count 3, and guilty on Count 4.

So say you all.

(The jury responded in the affirmative.)

THE COURT: Would you poll the jury.

THE CLERK: Ladies and gentlemen of the jury, I have just read your verdict into the record.

(Each juror, upon being asked, "Is that your verdict" responded in the affirmative.)

THE COURT: All right. Members of the jury, you have heard me express my appreciation to your two alternate jurors who were here before. I don't want to take up too

much of your time. It is late. But I would be remiss if I didn't express to you my appreciation for your cooperation, your attention to your duties here. I have asked you to be here on time in the morning and, unfortunately, because of my calendar which couldn't be helped, I have had to delay you. But you have been prompt and I appreciate that very much. And I appreciate the attention that you have given to the consideration of this case, and your willingness to put in late hours in order to complete the duties that you undertook in this case.

I said I wouldn't be long, but I do want to express to you my opinion that jury duty is perhaps the highest civil duty that a citizen can perform. It is only by having people like yourselves come here, all from different walks of life, to come in here and give your time and attention to the evidence and law as given by the Court. I believe that the only way we can preserve our system is by willing people like you, willing to come in here and serve, to put aside your businesses and social pleasures for the time that you have to serve.

I am sure that if any one of you unfortunately were involved in a litigation either civil or criminal, and hopefully none of you will be, we would hope that you would have serving on that jury judging your case people

as conscientious and interested in preserving the system as you have been.

I will not take up any more of your time. I have arranged to have limousines here to drive you home. I don't want you ladies going out alone at night. We have two limousines, and we have given the driver your addresses. If you will go with Marshal Walsh. You have to report at 9:00 tomorrow morning--well, do the best you can.

(The jury was discharged and left the courtroom.)

MR. MEYERS: Your Honor, may I enter a motion to set the verdict aside as being contrary to the weight of the evidence in each particular count.

MR. GOLDBERG: I do too, your Honor.

THE COURT: Why don't you reserve your motions in case you want to make them at greater length either between now and the date of sentencing, or the date of sentencing.

MR. GOLDBERG: Did they indicate before they went out that they hadn't reached a verdict on something and they had reached a verdict on something else, and then when they came back they had reached a verdict on everything?

THE COURT: I think the record is clear as to what they did. The Reporter has it down as to what transpired.

That is the way it is.

Is there any objection to continuing Mr. Payden on the bail as presently set?

MR. MacBETH: Yes, your Honor. The Government would move that Mr. Payden be remanded at this time. He faces very substantial maximum sentences for the crimes of which he's been convicted. Your Honor has already seen that there is one witness who has not appeared at this trial despite the fact that a subpoena was served on him, and the affidavit concerning that witness, the police officer indicated that as early as June of this year he felt that he was under some threat. Exactly what that threat came from was unclear.

Certainly the fact that after he was subpoenaed on Saturday he did not appear here should be taken into account. Money is something that comes quickly and easily to Mr. Payden. When he was arrested on this charge he had $1300 in his pocket.

Last year he was stopped for speeding and was found to have $20,000 on his person and in his car. So that the combination of the danger to the community and the seriousness of the crime of which he's now been convicted leads the Government to move that he be remanded.

THE COURT: He has bail of $35,000?

MR. MacBETH: No, your Honor, he has bail of $5,000 cash or surety.

MR. GOLDBERG: May I be heard, your Honor?

THE COURT: He has no prior record, as I understand it.

MR. MacBETH: He has--

MR. GOLDBERG: No prior record, Judge, except for a speeding violation.

MR. MacBETH: Nothing of narcotics violation. There were some gambling arrests.

MR. GOLDBERG: I don't think they resulted in conviction.

THE COURT: What is his family situation?

MR. MacBETH: The situation as I understand it is that he has three children, but I believe he is separated or divorced from the mother of the children, is that not correct?

MR. GOLDBERG: He has three children, your Honor, in New York City.

MR. MacBETH: He has no source of income.

THE COURT: Tell me something about the background in order for me to continue bail, at least his bail, or increase it to some extent.

MR. GOLDBERG: Your Honor, I have known Mr. Payden

for two years and for the last--since he's been arrested he's made every appearance. He's been in Court. He has three children in this State. There is no indication, no proof asserted by Mr. MacBeth that Mr. Payden would flee this jurisdiction. He lives in the Bronx at Beech Avenue. As a matter of fact, that is where he was arrested at his home, and I think the evidence in this case indicates that he has a home at those premises. He is 31 years of age. He has family in New York and as far as the money situation that he had on him, I don't think that bears upon whether or not he'd leave this jurisdiction.

More than that, the fact that John Law didn't testify--

THE COURT: He didn't answer the subpoena.

MR. GOLDBERG: I don't think that again bears upon Mr. Payden's--

THE COURT: It might have some bearing if he came in here and testified against it, but he hasn't shown up, even though he was subpoenaed by you, which might indicate that you would have wanted him here. I don't think that that is a problem.

What kind of additional bail can he put up? $5,000 is not very much bail.

MR. GOLDBERG: Not tonight, but I'm sure he can

post bail.

THE COURT: No, he can't do it tonight. What kind of bail can he post the first thing in the morning? I think it ought to be something that would make it worthwhile for him to want to be back here.

MR. GOLDBERG: I think that the bail that was originally posted was $5,000 cash.

THE COURT: But now there's been a conviction.

MR. GOLDBERG: No, what I am saying to your Honor is that bail that would have sufficed for a bail bond, had a bail bond been written for $10,000. We can get signatures and we can have more money. How much, I don't know.

THE COURT: Why don't you talk for a moment with Mr. Payden?

(Pause.)

MR. MacBETH: May I say just a few words, your Honor?

THE COURT: Surely.

MR. MacBETH: It is my belief, perhaps the question is being put to the defendant on this, that he doesn't live with his three children. So perhaps the family ties are much weaker than the mere fact that there are three children in this State. He told me in the interview in

late October that he was unemployed and worked only off and on in the last few years. And further, of course, the offense for which he's been convicted is a serious one and dangerous one in the community. It is trading in narcotics and cocaine, which is not a crime to be treated lightly.

THE COURT: I am aware of that. Of course, he faced that before he came to trial here also. I assume, maybe I shouldn't, that he is not living at home and the children are with his wife.

MR. GOLDBERG: No, he doesn't live at home.

THE COURT: Does he support them?

MR. GOLDBERG: Yes, your Honor.

THE COURT: Is there any Court order to support that?

MR. GOLDBERG: No, your Honor. It's voluntary.

THE COURT: Can he post $20,000 cash or surety by 10:00 tomorrow morning?

MR. GOLDBERG: Not by tomorrow morning, your Honor.

THE COURT: By 5:00 tomorrow afternoon?

MR. GOLDBERG: $20,000?

THE COURT: Yes. Cash or surety.

MR. GOLDBERG: I was thinking more in terms of

$5,000 additional.

THE COURT: I think it ought to be more substantial than that, Mr. Goldberg.

MR. GOLDBERG: Your Honor, I can see your point, but in one day--perhaps if at the end of the week, we can consult with a bondsman, because he didn't consult a bondsman. He took that money and put it up with the Court. That money could have been used on a bond or collateral--

THE COURT: All right. By noon on Friday, $20,000 cash or surety.

MR. GOLDBERG: Yes, your Honor.

THE COURT: I want him to call you tomorrow morning at 10:00. I want him to call you Thursday morning by 10:00, and Friday morning by 10:00.

MR. GOLDBERG: Call my office?

THE COURT: Call your office, leave word where he is, and if fails to call you, I will consider that a violation of his bail and if within a half hour you have not heard from him you shall forthwith call Mr. MacBeth or his office and leave word that you have not heard from Mr. Payden, whereupon a bench warrant shall issue immediately.

Do you understand that, Mr. Payden?

DEFENDANT PAYDEN: Yes, sir, I understand.

THE COURT: Do you understand you are supposed to

call Mr. Goldberg's office tomorrow morning, Thursday morning and Friday morning at 10:00 and you shall remain within the present bail limits, which are the Southern District of New York?

DEFENDANT PAYDEN: Yes, sir.

THE COURT: And if you fail to do this, Mr. Goldberg or his office will forthwith call Mr. MacBeth and a warrant for your arrest will issue. You have until 12:00 noon on Friday to post $20,000 cash or surety. All right?

DEFENDANT PAYDEN: Yes.

THE COURT: Your failure to comply with my direction or failure to appear for sentencing, which is set for January 20th at 9:30, and I am scheduled to be in courtroom 906, your failure to appear or to comply with these directions may be considered bail jumping, which is a separate and distinct offense, for which the maximum penalty is five years in jail and a $5,000 fine. You have to appear tomorrow morning anyway in any event at the Probation Office with your attorney, Mr. Goldberg, or someone else from his office to give the necessary information so that they may commence work on the pre-sentence report. All right.

Mr. Vernon continues in the bail presently set.

MR. MacBETH: That is acceptable.

THE COURT: Mr. Vernon, sentence will be set for January 20th at 9:30 in courtroom 906. I suggest that you consult with each other a few days before that and you also ascertain what courtroom I will be in, because sometimes we do change our assignments by reason of the fact that some other judge may need a different courtroom. All right, gentlemen. I appreciate your being here before me. I do not comment on the verdict. That is a function of the jury. So be it.

SB

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA, :

-against- :

DONALD PAYDEN, : 75 Cr. 421

Defendant. :

- -x

New York, New York
March 1, 1976
10:00 A.M.

B e f o r e:

HON. LEE P. GAGLIARDI,

District Judge.

A p p e a r a n c e s:

THOMAS J. CAHILL, ESQ.,
United States Attorney,
ANGUS MACBETH, ESQ.,
Assistant United States Attorney

SIDNEY MEYERS, ESQ.,
Attorney for defendant.

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THE CLERK: United States of America against Donald Payden.

Is the government ready?

MR. MACBETH: Ready for the government.

THE CLERK: Defendant Donald Payden ready?

MR. GOLDBERG: Ready.

THE COURT: Mr. Payden, is there any reason why sentence should not be imposed at this time?

THE DEFENDANT: No.

MR. GOLDBERG: Your Honor, before sentence is imposed, on the day the verdict was announced by the jury, your Honor gave me permission to make my motion on the day of sentence.

THE COURT: Yes.

MR. GOLDBERG: At this time, your Honor, I would submit the following: I would at this time resubmit my motions made prior to trial, especially in connection with those involving my continuous application for a continuance at that time, and the other motions to dismiss I also wish to resubmit.

More than that, your Honor, it has become apparent to me after looking at the record that there was a misjoinder in this case, specifically with regard to the fourth count of the indictment.

If you recall, your Honor, that count which named Mr. Vernon and his associates, the Bells, in that part of the indictment, I feel that, your Honor, pursuant to Section 8(b) of the Federal Rules, that count of the indictment should have been severed, taken out of the indictment, and when the subsequent indictment or the redacted form of that indictment was proferred by Mr. Macbeth some three hours prior to the trial, it severely prejudiced my client in that I could not argue on summation that Mr. Vernon was not the type of person who would introduce an undercover agent to his connection, so to speak.

For these reasons, your Honor, I feel it prejudiced my client and prejudiced my ability to respond to the government's summation, which took some time alluding to that transaction between Mr. Vernon and Mr. Bell or the Bells.

For that reason, your Honor, I move for a dismissal of the indictment and for a directed verdict of acquittal.

THE COURT: Mr. Macbeth, do you have anything to say?

MR. MACBETH: Only, your Honor, that I do not believe Mr. Goldberg objected to the inclusion of that

count against Mr. Vernon at the time of trial and that on that basis he has waived any argument that there has been misjoinder. The issue was raised and discussed before the trial, and that would have been the time for Mr. Goldberg to raise any objection he had to a joinder of that count.

THE COURT: I feel that it had no effect upon this case. I further feel that motions in Part I are indicated to be made within ten days after the filing of the indictment. I am certain that that was done in here and that no such motion was made. Whether there was waiver -- not waiver -- whether there was a failure to make the motion or not, on both grounds I would deny the motion, failure to make the motion within the time prescribed, and also I do not feel there was prejudice in any way whatsoever by the joinder of those counts in the manner in which this case was presented to the jury.

I deny the motions.

MR. GOLDBERG: One more thing, your Honor.

When I had the opportunity, as your Honor gave it to me, to review the probation report, which I did last week, there was an indication in that report that Mr. Vernon was to receive some sort of credit or something in mitigation of his sentence because at one time or other he cooperated with the government.

Now, if your Honor recalls the trial and recalls the events that took place, I just wonder whether or not if in fact during the course of this trial he was an agent for the government, because under U. S. v Lusterino, your Honor, it would have definitely hurt Mr. Payden's case if at the time this trial was proceeding he was in fact then a government agent.

I don't know, your Honor. I don't know what his part was, but I do recall seeing, at least in my portion of the probation report, some sort of recommendation or some sort of request on the part of the government to mitigate his sentence.

THE COURT: What do you have to say to that, Mr. Macbeth?

MR. MACBETH: Very simply, your Honor, that before this trial and during this trial Mr. Vernon was not an agent of the government and he did not cooperate with the government in the prosecution of this case. As your Honor knows, he went to trial on the case and was convicted before the jury. He was in no way an agent of the government.

THE COURT: All right.

MR. GOLDBERG: Then, your Honor, I speak on behalf of Mr. Payden.

THE COURT: Do you have anything to say on his behalf or do you wish to present any information in mitigation of punishment?

MR. GOLDBERG: As your Honor knows, I submitted to your Honor a presentence memorandum which I am sure you have received, your Honor, and I personally delivered it to your chambers and it was made part and parcel of the probation report, which I have had an opportunity to read.

Mr. Payden is 31 years of age. He has no prior conviction, except in my looking at the probation report I see that there some mention made of counterfeit money. But my information, your Honor, gleaned from Mr. Payden, is that the only thing he pled guilty to in connection with that '74 --

THE COURT: I think there was only a $10 bill involved.

MR. GOLDBERG: I thought it was a vehicle and traffic law violation. I don't know where that counterfeit money thing came in, but it was in my conversations with Mr. Payden he said he believed it was just a violation of the New York State Vehicle and Traffic Law.

THE COURT: That is the way I view it. I think he had $20,600 on him and one $20 bill was counterfeit,

and I don't consider that in any way with respect to this as being anything other than a traffic involvement. That's the way I look at that.

MR. GOLDBERG: Mr. Payden stands before you, then, not having been convicted of anything. Your Honor heard the testimony at the trial. Your Honor has before you a full and complete probation report with regard to Mr. Payden's background.

I just wish to state, your Honor, Mr. Payden is employed. He has here in the courtroom a number of people, your Honor, who have submitted letters on his behalf, specifically, one Tanya Garland, who is here from the New York College of Pediatrics, and you have before you her letter indicating Mr. Payden's background in the community and what he has done.

You have also in this courtroom Jaunice Hubbard, who is employed by the Board of Education and is also here in Mr. Payden's behalf; and Milton Martin, Director of SEEK at Hunter College, who is also here in his behalf.

Your Honor, aside from these people who are knowledgeable of Mr. Payden's background and have known him to be a man given to community service, his boss is also in this courtroom, your Honor, one George DiPlacidi, who is boss of the Downing Construction Company, who has

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employed Mr. Payden since this trial where Mr. Payden is now working as a general foreman.

Your Honor, I wish to say something in Mr. Payden's behalf because before I went into the private practice of law I had known Mr. Payden when I was legal director of the Morrisania University and Community Center. It was these people Mr. Payden sent to me. When I was counsel for that program, which I was for two and a half years, your Honor, I have seen Mr. Payden myself work with one aspect of our community center, which was the recreation aspect. At that time we would counsel young individuals in the Morrisania section of the Bronx and represent them in criminal matters, but we didn't just stop there. We tried to get them jobs and to get them employment, and one of the escapes for these individuals, your Honor, was in our gym, in recreation, and Mr. Payden, I know him from that time, he used to work with these young men.

From the letters I have seen and submitted in his behalf from other people, I feel this is a man who has given to the community and I know the charges here are serious, we had an extensive trial, but I wish to point out, your Honor, nowhere in the course of that trial were there any indications from the undercover agent that this man had any direct conversation pertaining to

narcotics, that he handed over narcotics, that he accepted money in lieu of the narcotics, your Honor. If your Honor recalls the testimony, the case was essentially based upon the hearsay declarations of Billy Vernon and nothing else.

Now, your Honor, I am not going to dispute the fact that Mr. Payden gambles. I think it is apparent from his own admission and from his background. But nowhere in his background, your Honor, is there any indication that this man sold, was convicted of any narcotics crimes. For this reason, your Honor, I ask you to be sympathetic towards him and temper your sentence today with mercy.

THE COURT: Mr. Payden, do you have anything to say on your own behalf or do you wish to present any information in mitigation of punishment?

DEFENDANT PAYDEN: In behalf of my family and kids, I wish you would give me the least you see fit. Thank you.

THE COURT: Mr. Macbeth?

MR. MACBETH: Your Honor of course presided over this trial and knows the facts brought out at trial and also has the advantage of a full probation report so that the government will not add anything at this time beyond just one point that came to my attention in looking at the information presented to your Honor, and that involved a

letter on the letterhead of Joan of Arc High School from Mr. McGee.

At the time bail was set for Mr. Payden, Mr. McGee was here on the bail matter and I looked into his employment at that time and was told by the Joan of Arc High School he was a former employee there but was not an employee at that time in November and just to be sure, I checked again this morning and was informed Mr. McGee was not an employee of the Joan of Arc High School. I felt that was something your Honor should know about in looking over the letters and information presented. Beyond that the government has nothing to add.

THE COURT: I have the letter dated December 22 from Mr. McGee, which is submitted in connection with this matter here. There is no indication of any employment there in the letter itself but it wasn't addressed to that.

MR. GOLDBERG: May I clarify? Mr. McGee was laid off because of the cutbacks. He is a licensed teacher and he teaches in the public schools as well. He had worked for Joan of Arc.

THE COURT: All right. I don't suppose it requires repeating that these are always very difficult matters to do, a sentencing of an individual. This case does present some particular ramifications that have to be

taken into account. I am satisfied on the basis of the trial in this case and what I have heard that Mr. Payden was dealing -- trafficking in narcotics in the community which in many other ways he was serving so well. It is unfortunate that there is that contradiction in his background: his willingness, as evidenced by the many letters that have been submitted to me, to help out everybody that he could and do so much good civic work there, and, on the other hand the Mr. Hyde aspect of it where he is dealing in the commodity that I think is a major problem if not the major problem in the community in which he was working, in narcotics trafficking; where we see so many of these cases come up, and I don't know that we are ever going to solve it by the prosecution in these courts but perhaps it has some effect. I am not certain how much. It certainly cannot be effective unless when those who have been dealing in it are apprehended, tried fairly and convicted, that we recognize it is a serious offense of the law and one of the most serious offenses that I can think you can do in that community.

I am satisfied in my own mind if I had not had the benefit of the many friends of yours and admirers of yours for what you have done over, if they had not submitted the letters they have in such glowing terms, that the

punishment I am about to inflict would have been substantially more severe because, as I have indicated, of my feelings about narcotics trafficking and particularly the community in which you were operating.

Without belaboring it any more and taking all these matters into consideration, it is the judgment of this Court that on count 1 the defendant be committed to the custody of the Attorney General or his duly authorized representative for a period of six years, to be followed by a special parole term of six years and a fine of $5000.

On count 3, it is judgment of this Court that the defendant be committed to the custody of the Attorney General or his duly authorized representative for a period of six years, to be followed by a period of special parole of six years, the sentence on count 3 to run concurrent with the sentence on count 1.

That is the judgment of this Court.

Mr. Payden, you have ten days within which to file a Notice of Appeal. If you are without funds to file a Notice of Appeal, the Court will direct that the appeal be filed without the necessity of paying any filing fee. If you do not have funds to retain an attorney, and so satisfy this Court by the filing of an appropriate document,

an attorney will be appointed by the Court to represent you on the appeal.

MR. GOLDBERG: Along this line, may I make an application at this time?

THE COURT: Yes.

MR. GOLDBERG: At this time, your Honor, I would move that Mr. Jay Goldberg, who is going to handle Mr. Payden's appeal, be substituted for myself at this point with the permission of the Court. He is here in court, your Honor.

THE COURT: Is that privately retained, Mr. Goldberg?

MR. JAY GOLDBERG: Yes, your Honor.

THE COURT: I have no problem with that. File the necessary papers with the Court. I am sure there is going to be an application for bail pending appeal?

MR. JAY GOLDBERG: Yes. But I wanted to bring this to your Honor's attention, if I may. I have prepared a Notice of Appeal not to delay the appellate process to the tenth day. I have also prepared a draft of the brief so that the case can be scheduled promptly.

I would ask for bail pending appeal in light of the strong roots that this defendant has in the community and his appearance and availability even though this matter

has been rescheduled because of the pressing schedule of the Court in other matters, this defendant has been here or available on at least two or three other occasions when this case was scheduled for sentence. The letters and the people who have come to court stand at least for one thing, and that is that this man has strong roots in the community.

I have read the record and I do feel, your Honor, most respectfully, that there are serious appellate issues with respect to the misjoinder matter and it is far from being a frivolous appeal, and the defendant poses no danger to the community because he has been at large now for a number of months without any incidents and without failure on the part of himself to appear in court or before the Probation Department.

I would pray that your Honor would continue this man on bail on my assurance that today, the next fifteen minutes, I will file a Notice of Appeal and proceed diligently with the appeal.

THE COURT: Mr. Macbeth?

MR. MACBETH: The government would oppose that application, your Honor. This is a serious crime. A serious sentence has been imposed by the Court. I think the Court is fully aware of all the facts in the case and the facts in the probation report, and based on all of that

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the government opposes anything except immediate surrender of the defendant.

THE COURT: What is the present bail?

MR. GOLDBERG: $20,000.

MR. JAY GOLDBERG: The bail was originally five and your Honor raised it to 20. It took three days for the defendant to raise that surety bond increase. The defendant has been at liberty since the day of conviction, which I think was in November, without, as I say, any incident whatsoever or any matter that might cause concern to the Court.

THE COURT: It is customary to at least increase bail in some amount pending appeal. How do you stand with respect to that, Mr. Goldberg?

MR. JAY GOLDBERG: Your Honor, it might well be the custom and certainly I could see your Honor's point. The only thing that is a problem to me in this case is the thing you outlined in your remarks prior to sentence. There is a part to this man's character that makes me confident that if you had no bail here he'd be present. In other words, he came to my office, he engaged me, he's worked with me, I have given him drafts of the brief, he is dedicated to proceeding with this matter in a forthright appropriate manner. It is not the kind of client who shows

absolutely no certain, nor is it a client where many people haven't responded to him. This is the sort of fellow that is somewhat unique in the run of the million defendants, so to speak. I just think $20,000 bail under those circumstances would be adequate in a realistic sense to assure his presence.

I do know the custom would be to increase it, but if you are concerned about risk of flight, I tell you from my contact with him since December he is a stable individual, he knew the kind of sentence that he faced, it doesn't come to him as any shock, but people who are here today should firmly stand as support for the proposition that he can be counted on to appear and I am sure your Honor knows that I will press forward with the appeal without any effort to delay the appellate processes.

THE COURT: My only problem along these lines, with the number of letters I have read, is to wonder whether you might not get somebody among these or others that might be willing to sign a personal recognizance bond for the amount over and above I might set of the amount currently outstanding. That is what I had in mind.

MR. JAY GOLDBERG: Fine.

THE COURT: If these letters have the value I attach to them, and I have, because they are written by

responsible people, in view of what they say about Mr. Payden, that might be of some assistance in assuring his being here and not to let them down in the event anything happened. That is what I had in mind.

MR. JAY GOLDBERG: May I have a moment, your Honor?

THE COURT: Sure.

MR. JAY GOLDBERG: He will ask his employer, your Honor, and a number of other friends who are here will also sign.

(Pause)

THE COURT: The employer has indicated he would be willing to put his name on the record so you can ask what work he is doing. I understand he is doing rehabilitation work for the City.

Yes, sir. May I have your name?

A VOICE: George DiPlacidi.

THE COURT: What is your employment, Mr. DiPlacidi?

MR. DI PLACIDI: I am the president of the Downing Construction Corporation, rehabilitating buildings for the City.

THE COURT: How long have you been in this business?

MR. DI PLACIDI: About five years.

THE COURT: How many men do you employ?

MR. DI PLACIDI: Currently, about fifteen.

THE COURT: All right. I will increase the bond by requiring an additional $10,000 personal recognizance bond to be signed by the defendant and by Mr. DiPlacidi.

You understand, Mr. DiPlacidi, if Mr. Payden does not show up in the event that his conviction is affirmed and he is required to surrender, that if he doesn't show up that you would be obligated, if he didn't do it, to pay $10,000 on his behalf?

MR. DI PLACIDI: I will sign it.

MR. JAY GOLDBERG: Your Honor, I will stay with him now, file my Notice of Appeal --

THE COURT: We have to get the judgment up. You can have until tomorrow at noon to file it.

MR. JAY GOLDBERG: Fine. I will file a Notice of Appeal now and serve a copy on the U.S. Attorney. Thank you, your Honor.

MR. GOLDBERG: Thank you, your Honor.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Docket Number 75 Cr. 421 (LPG)

UNITED STATES,

—v.—

DONALD PAYDEN, et ano.

NOTICE OF APPEAL

Notice is hereby given that Donald Payden appeals to the United States Court of Appeals for the Second Circuit from the judgment of conviction entered in this action on March 1, 1976.

JAY GOLDBERG
(Counsel for Appellant)
299 Broadway
New York, N. Y.
212—374-1040

Date: March 1, 1976

To: Clerk of District Court
Southern District of New York

Received by AUSA John E. Sabella 4/13/76